83-1320

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM,

WESLEY K. BELL, Defendant Appellant

vs.

TOWNSHIP OF EAGLESWOOD, Plaintiff Appellees

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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for Appellant

January 18th 1984

TABLE OF CONTENTS

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. May the Township of Eagleswood, consistently with the First and Fourteenth Amendments to the United States Constitution, do the following? (a) eliminate and totally prohibit all outdoor advertising within the limits of the Township, (b) arbitrarily concede, in Superior Court, that Outdoor Advertising is permitted up to 32 sq.ft. in business zones, even though no such provision exists in the Zoning Ordinance, (c) use the Police Power to subject the defendant appellant to incarceration and fines of $50.00 a day because he attempted to maintain billboards on a tract of land which existed since 1960, (d) use the Police Power to levy excessive fines for failure to remove existing billboards deriving an annual income of

$4,200.00, while he attempted to obtain a stay from a higher court, during pending appeals, (e) interfere with defendant (appellant's) property rights by terminating his non-conforming uses, in a commercially used area, (f) Use the Police Power to arbitrarily enforce an ordinance against this defendant, (appellant) while allowing a competitor to relocate a larger billboard, across the street, at a greater distance than appellants, (g) zone a business area where no residences exist and place a bar, a machine shop and two adjacent billboards into a residential zone and then enforce residential zoning in that commercial area?

Table of Authorities

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WESLEY K. BELL

Defendant-Appellant

v.

TOWNSHIP OF EAGLESWOOD

Plaintiff-Appellees

OPINIONS BELOW

The Supreme Court of New Jersey denied certification on October 25th., 1983 on Appeal from the Appellate Division of Superior Court of New Jersey. The opinion of the Appellate Division of Superior Court of New Jersey was issued on July 25th., 1983 and is contained in the Appendix at (121 a).

The opinion and transcript of the original hearing and decision, dated July 9th., and 22nd., are contained in the Appendix at (6 a) and (76 a). Judge Henry H. Wiley, J.S.C. of the Superior Court of New Jersey, Chancery Division orders of:

An order of Associate Justice Daniel J. O'Hern of the New Jersey Supreme Court, denying stay, dated Oct. 2nd., 1981 is contained in the Appendix at (102 a).

JURISDICTION

The subject of this case is the Constitutionality of an Ordinance and its enforcement by the Township of Eagleswood, which totally eliminates and destroys the entire outdoor advertising industry within the Township's boundaries.

The Supreme Court of New Jersey in denying Certification, actually upholds the Townships discriminate use of its Police Powers against the same set of standards to others.

The Appellant Courts finding that the "limitation here is reasonable" is in complete violation of the United States Codes:

28 U.S.C. 1291

28 U.S.C. 1331

28 U.S.C. 1343

42 U.S.C. 1983

Jurisdiction of this Court to review the final judgment of the Supreme Court of New Jersey is conferred by 28 U.S.C. 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the Eagleswood Township Zoning Ordinance and its enforcement thereof, are set forth in the Appendix, commencing at (156 a) and (1 a).

STATEMENT OF THE CASE

The Defendant Appellant in this case, was the Mayor of an adjacent community, Stafford Township. In 1981, the Mayor won the Democratic Nomination for the State Senate seat, created in the newly restructured Ninth Legislative District, in the State of New Jersey.

The Plaintiff Appellee is a Township known as Eagleswood Township, and its Mayor, John Hendrickson, had won the Republican Nomination for State Assembly, in the same newly created Ninth Legislative District, in New Jersey.

In July, 1981, Plaintiff's Mayor instructed his Zoning Officer to commence an action against this Defendant Appellant and used the Township Attorney, George Gilmore, to take Defendant into Court, repeatedly and continually demanding his incarceration and levying of excessive fines and publicly defaming him during an election campaign. (See Appellants Brief at trial level, page 131 a).

These hearings placed the Defendant Appellant in Court on July 22nd.,1981, Sept. 24th.,1981, Oct. 2nd.,1981, Oct.

6th.,1981, Oct. 19th.,1981, Oct. 21st., 1981 and finally on July 2nd.,1982. Continual, daily front page, adverse and negative publicity, portraying Defendant Bell as a defiant violator of the law and this publicity played a major role in Defendant Appellants defeat in the November, 1981 General Election.

On July 9th., 1981 Plaintiffs attorney met with Judge Henry H. Wiley, alone and in his chambers, for over twenty minutes, just prior to this matter being heard. At that time, this Appellant was not aware that George Gilmore had previously been "clerk" to Judge Henry H. Wiley or he would have demanded that Judge Wiley turn this matter over to another judge.

Defendant Appellant had originally leased this premises and later

purchased an interest, which was later sold in exchange for perminant Real Estate easements, where the Billboards were believed to be located.

The present Zoning Ordinance, if allowed to continue application, will in effect, condemn these easements without compensation.(see Ordinance page 1a).

The Police Power of the Township, in this matter, not only condemns without compensation, but it has levied a fine which now has reached three thousand dollars (see court order of Sept.24th.,1981 on page 98 a and application of Stay of Judgment on page 90 a and 91 a), and had placed a daily and public threat of incarceration of this Appellant (see all court orders page 95 a to 118 a).

The Townships position of enforcing its Ordinance against this Appellant and not on others, is a violation of this Appellants Civil Rights and his right to equal protection under the law.

The Townships enforcement of an Ordinance which does not allow Outdoor Advertising, is unConstitutional on its face and if in fact, a 32 sq.ft. sign was allowed, even though the Ordinance does not set such standards,(see transcript page 81 a), such a small size is, in effect, a total ban because the average size of a billboard in the United States is 300 sq.ft. (Patrick Outdoor Media, Inc. v. Boro of Dickson City 83 Civil 372 (1983), and (Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Twp. 417 Pa.397,207 A.2d 890(1965).

The relocation of these billboards are in effect, so insubstantial or negligible that administrative interference by the Plaintiff municipality is improper and a violation of Defendant Appellants Constitutional rights.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The issues raised by this appeal are substantial, as it is suggested, at the outset, by the method that the trial court refused to decide the Constitutional issues which were raised (see transcript of trial on page 76 a). The trial court sidestepped these same issues, which then allowed the Township to continue to violate "Appellants protected rights".

ARGUMENT

I. The total ban on the medium of

Outdoor Advertising is violative of the First Amendment. (Patrick Outdoor Media,Inc. v. Boro of Dickson City 83 Civil 372).

At issue on this appeal is the total "elimination" of a "means of communication and a media for the expression of ideas through outdoor advertising".(See Zoning Ordinance page a). The parties to the litigation are not alone in so characterizing Outdoor Advertising. Outdoor Advertising has been recognized by the United States Congress, as one of the nations separate and distinct "communications media" in the Federal Campaign Communications Reform Act, 47 U.S.C. 801(1)(repealed 1974). See also Federal Election Campaign Act of 1971, 2 U.S.C. 431,441(d)(1976).

The Ordinance as written and approved

by the Eagleswood Twp. governing body, totally eliminates all Outdoor Advertising within the Township. Yet, to sidestep this issue, Plaintiffs attorney, in court, concedes that the Township will allow a thirty-two sq.ft. Billboard, even though it is not a permitted use.(see transcript at page 27 a.)

A thirty-two sq.ft. Billboard is, in fact, no Billboard at all, because commercial Billboards throughout the United States are at an average size of three hundred sq.ft. in area. (Exton Quaries Inc. v. Zoning Bd. of Adjustment 425 Pa.43, 228 A2d 169(1967); Daikler v. Zoning Bd. of Adjustment, 1 Pa.Commonwealth Ct. 445 275A 2d 696(1971); Shewsbury Twp. v. Glatfelter 87 York Leg.Rec, 41(1973); Creative Displays Inc. v. Twp. of Lower

Macungie Zoning Hearing Board,40 Lehigh L.J.1 (1982).

The Daikler court further stated that "where there is a total exclusion, no matter how it is accomplished, the municipality must bring forward sufficient and valid reasons for the prohibition". 1 Pa.Commonwealth Ct. at 454, 275A 2d at 699-700. See also Beaver Gasoline Co. 445 Pa. 571, 285 A 2d 501(1971).

The Commonwealth Court considered a similar set of facts to this Eagleswood Twp. case, in that a review of the provisions of the Ordinance, coupled with the omission of any provision for off-site business signs, amounted to a Township-wide prohibition of off-site advertising.(Daikler case, supra, at 1 Pa.Commonwealth Ct.448, 275 A 2d 696-697). See also Creative Displays

Inc.v. Township of Lower Macungie Zoning Hearing Bd. 40 Lehigh L.J.1 (1982) and Patrick Outdoor Media,Inc. v. Boro of Dickson City in the Court of Common Pleas, Lackawanna County 83 Civil 372(1983).

II. The Police Power of Eagleswood Township cannot Constitutionally be utilized so as to destroy an individuals right to be in the Outdoor Advertising business, in the absence of proof that continuance of the business in its present form adversely affects the health, safety or tangible welfare of other persons or property. (Daikler v. Zoning Bd. of Adjustment 1 Pa. Comm.Court 445,275 A 2d 696(1971).

This Courts decisions establish that regulation of the use of property is permissible under the police power; but that some alleged regulatory authority

under the police power exceeds constitutional parameters. Determination of that issue is one of reasonableness, one requiring an assessment of two components - private loss and public gain. (Goldblat v. Town of Hempstead, 369, U.S.590,594(1962).

III. The provisions and enforcement exercised by Eagleswood Twp., to repeatedly and publicly demand to hold this defendant for incarceration and for the Trial Judge to hold this defendant for incarceration (see Court Orders page 95 a to 118 a) is unlimited use of police power and is a violation of the United States Constitution. (General Outdoor Advertising Co. v. Goodman, 128 Colo 344, 262 P 2d 261 (1953).

Defendants rights to maintain non-conforming uses on privately owned,

recorded easements are a protected right and each and every day that this right is denied, is in itself, a separate violation of Defendants Constitutional Rights.(Richard J. Elrod v. John Burns, 96 S.Ct. 2673 (1976).

To forbid use of Defendants Billboards and permenant easements are, in fact, a taking of private property without compensation (City of Buffalo v. Michael, 16 N.Y. 2d 88, 262, N.Y.S. 2d 441, 209 N.E. 2d 776 (1965). The Court held "signs and billboards permanently affixed to land or buildings are compensable fixtures". Also National Advertising Co. v. Utah State Road Commission, 26 Utah 2d 132, 486 P 2d 383 (1971). The Court held "defendants have not offered to pay just compensation for the removal of said sign nor is there any evidence

before the Court that there are funds available for payment of just compensation, under these circumstances, as required by Utah Code, Annotated, Section 27-12-136.11(1953) and that there has been no procedure by the Commission to remove the sign and pay just compensation therefor, as provided in the Highway Beautification Act." 496 P 2d at 385.

In the Eagleswood Twp. case, defendant testified that another Billboard, owned by a competitor, which is larger and is located across the highway from Defendants Billboard, was moved a greater distance, without any interference from the Township and therefore the Ordinance was being applied in a discriminatory manner, against Defendant.(see photo exhibits

at pages 88 a and 89 a; testimony at trial level on page 40 a and Brief presented at trial level, addressing this issue on page 131 a.) In Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla.1963) the Supreme Court of Florida stated "that police power measures must not impose discriminatory restrictions on the use of private property".

At the trial level, Defendant presented photographs of a 250 sq.ft. Billboard, across the highway, which carried a message for Plaintiff Mayor and his Republican ticket, for the November General Election, while the Defendant's third Billboard was to carry his advertisement for the same election, for the Democratic Party.(See photos on pages 88 a and 89 a, Brief at trial level on page 131 a, transcript at trial level, July 9,1981

at page 40 a and transcript of Hearing July 22,1981, as to the form of the order, at page 85 a.)

In an Oregon case, the Supreme Court ruled in Webb v. State, 217 Ore. 1, 340 P 2d 968 (1959), "so far as we are advised, there is nothing in the nature of signs used to advertise the business or product of a single commercial enterprise, which the legislature could have considered more likely to interfere with the "safe and efficient use, and orderly appearance of the highways" than signs erected and maintained by different advertisers. There is no point of differentiation which makes immediate removal of the signs of one class expedient, desireable or necessary, but not the signs of the other. It follows that the classification cannot be sustained

and the statute, insofar as it ordains immediate removal of plaintiffs signs, while permitting those which do not conform to different provisions of the statute to remain for five years, contravenes the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, is void. 340 P 2d at 973-974. See also Alabama Indep.Ser.Sta.Assn. v. McDowell, 242 Ala. 424 6 So. 2d 502 (1942).

CONCLUSION

The questions presented by this Appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted.

WESLEY K. BELL, Pro Se
188 Rt.72, P.O.Box 538
Manahawkin, N.J. 08050
(609)597-3222

My Commission Expires 1-31-86

Sworn & Subscribed before me
this 8th day of Feb, 1984.

CERTIFICATION OF SERVICE

I, WESLEY K.BELL, Appellant in the above entitled cause, hereby certify that on the 8th day of February, 1984, that three copies of the attached Brief and Appendix of the Appellant

were served upon George Gilmore, Esq., attorney for Plaintiffs Township of Eagleswood, County of Ocean, State of New Jersey, by Certified Mail, to their office at Nine Allen Street, P.O. Box 1540, Toms River, New Jersey, 08753 and upon the Solicitor General, Department of Justice, Washington, D.C., 20530.

Wesley K. Bell

WESLEY K. BELL, PRO SE

Sworn and subscribed before me on this 8th day of February, 1984

Agnes E. Lane

My Commission Expires 1-31-86

APPENDIX (continued) PAGE

APPENDICES

TOWNSHIP OF EAGLESWOOD

COUNTY OF OCEAN

STATE OF NEW JERSEY

CHAPTER 103

ZONING

SIGN AND BILLBOARD ZONING FOR ALL DISTRICTS

103-6	RA	Residential District
103-7	R-1	Residential Zone
103-8	R-2	Residential Zone
103-9	R-3	Residential Zone
103-11	C-1	Marine Commercial District
103-12	C-2	Highway Commercial District
103-13	C-3	Neighborhood Commercial District
103-14	LM	Limited Manufacturing

G. Permitted signs.

(1) A business or advertising free-standing sign not in excess of

thirty-two sq.ft. in surface area per side.

(2) A shopping center shall be permitted two (2) free-standing business signs each not over thirty-two sq.ft. (32)in surface area per side. No part of either sign shall be closer than ten (10) feet from a side lot line. When only one such identification sign is erected, the total surface area may be increased by fifty percent (50%).

(3) Signs for automobile service stations may provided one (1) free-standing double-faced sign not to exceed thirty-two square feet in surface area per side in addition to one (1) wall sign. Said signs shall not exceed twelve (12) inches in thickness and may advertise only the trade name of the product offered for

sale.

ARTICLE VI

Nonconforming Uses

103-39. Nonconforming uses of land.

Where, at the effective date of adoption of this chapter, lawful use of land exists that is made no longer permissible under the terms of this chapter, such use may be continued subject to the following provisions:

A. No such nonconforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied by such use at the effective date of adoption of this chapter.

B. No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption of this chapter.

C. If any such nonconforming use of land ceases for any reason, for a period of one (1) year or more, any subsequent use of such land shall conform to the regulations specified by this chapter for the zoning district in which such land is located.

103-40. Nonconforming structures.

Where a lawful structure exists at the effective date of adoption of this chapter that could not be built under the terms of this chapter by reason of restrictions on lot area, lot coverage, height, yards or other characteristics of the structure or its location on the lot, such structure may be continued, subject to the following provisions:

A. No such structure may be enlarged or altered in a way which increases its nonconformity, but may be enlarged or altered, provided that said change does

not extend into any front, side or rear yard established by this chapter, notwithstanding existing setbacks.

103-41. Nonconforming Uses of Structures.

If a lawful use of a structure or of structure and premises in combination, exists at the effective date of adoption of this chapter, that would not be allowed in the district under the terms of this chapter, the lawful use may be continued, subject to the following provisions:

A. No existing structure devoted to a use not permitted by this chapter in the district in which it is located shall be enlarged, extended, constructed, reconstructed, moved or structurally altered except in changing the use of the structure to a use permitte in the district in which it is located. (Rev.Ord.Supp. 12/78)

SUPERIOR COURT OF NEW JERSEY

OCEAN COUNTY - CHANCERY DIV.

DOCKET NO. C-4054-80

APPEAL NO. A-00428-81

TWP. OF EAGLESWOOD,
Plaintiff,

v.

WESLEY K. BELL,
Defendant,

TRANSCRIPT

OF

ORDER TO

SHOW CAUSE

BEFORE: HONORABLE HENRY H. WILEY, J.S.C.

Ocean County Courthouse

Toms River, New Jersey

July 9, 1981

APPEARANCES:

HIERING, GILMORE & MONAHAN, ESQS.

BY: GEORGE GILMORE, ESQ.

for the Plaintiff.

WESLEY K. BELL,

Defendant Pro Se

ORDERED FOR APPEAL BY:

DANIEL SUGRUE, ESQ.

DAYETTE J. ZAMPOLIN, CSR.
Official Court Reporter
Ocean County Courthouse
Toms River, N.J.

INDEX TO EXHIBITS

NUMBER	DESCRIPTION	EVIDENCE
P-1	Eight photos	10
D-1	Judgment	45
D-2	Survey	45

THE COURT: Mr. Gilmore, Mr. Bell gave me a survey and a copy of a prior judgment. Have you seen those documents?

MR. GILMORE: Yes, I have, your Honor.

THE COURT: Do you have any objections to my considering them or looking at them?

MR. GILMORE: As to the partial judgment, no, your Honor. As to the survey, I don't know what it would actually show. There is no indication--the location of the billboard signs by the engineer, itself, there are markings on there.

THE COURT: There is existing sign--

MR. GILMORE: Existing signs, Okay.

THE COURT: In two different places as I see it.

MR. BELL: Yes.

MR. GILMORE: One off the property and one on the property.

MR. BELL: Right.

THE COURT: Yeah. And so there's that, at least to that extent here and--

MR. BELL: We didn't--your Honor, we didn't have a copy of this survey until yesterday when I paid the bill for it.

MR. GILMORE: No. The only question I have, your Honor, is there's no way of my knowing of the one sign which of the three signs on the property it is, if any of those three signs, but I have no objection to your Honor reviewing it--the survey.

THE COURT: All right.

MR. GILMORE: Your Honor, as you know, this is a return date of an Order to Show Cause. Actually, it's an adjourned return date. This matter has been adjourned twice previous to today at the defendant's request.

The matter is quite simple and I feel that our verified complaint and the affidavit of Herman Pharo, the Zoning Officer for the Township of Eagleswood, clearly sets forth the position of the Township. Essentially that is that the defendant has relocated two billboard signs as--and was in the process of relocating a third on the property which he has an easement in an R-2 Residential Zone in the Township of Eagleswood. And at least two of the signs were previous to this time located on another portion of the

property in the Township of Eagleswood and were nonconforming uses as the present Township Code prohibits billboard signs in the R-2 Residential Zone.

The defendant was advised by the--the Zoning Officer for the Township of Eagleswood, Herman Pharo, that he would have to make application for a zoning permit to relocate these three billboard signs. And that application was indeed filled out by the defendant. A copy of that application is attached to the complaint as Exhibit A for the Court's review.

The Zoning Officer for the Township of Eagleswood denied the application as is set forth in his comments on that application for the reason that the relocation was prohibited under Section 103-39 of the Township Code. And I've

attached a copy of that section for your Honor's review as Exhibit B on the verified complaint.

Specifically, the problem we have, your Honor, is billboard signs are not permitted in the R-2 Residential Zone. Signs which are permitted in the R-2 Residential Zone are such that the largest sign permitted cannot have a size exceeding 32 square feet.

The two billboard signs that the defendant has erected have an overall dimension of 11 and a half feet by 30 feet for total square footage of 345 square feet; which is more than ten times in excess of the permitted square footage allowance.

The defendant was advised by letter that his proposed erection of the billboard signs was, in fact, in violation of the 32 foot limit; that letter coming from the attorney for the Board of Adjustment for the Township of Eagleswood, and that letter was attached to the complaint as Exhibit C.

In addition, your Honor has before you the affidavit of Herman Pharo which recites the fact that Mr. Bell was advised that he must fill out a zoning application for a zoning permit, that the same was denied, that the defendant chose not to make--take an appeal to the Board of Adjustment, but rather decided on his own that he did not need his own permit and went about to erect these signs.

No answer has been filed by the defendant in this matter. A brief

filed by the defendant, and that brief raised certain issues which I'll address at this time.

The defendant asserts in point one that these billboard signs are not conforming uses and therefore not subject to the zoning ordinance. While as conceded by the plaintiff that the defendant had located his billboard signs in other portions of the Township prior to erecting them on the present site, that these uses were--the billboard signs were erected prior to the adoption of the Zoning Ordinance of the Township of Eagleswood, and therefore, were nonconforming uses, and if those signs were kept in the same location to this date, the Township would have no right to seek their removal, because they would indeed be not conforming uses; but I think the

defendant misses the point. What the Township is objecting to here is the relocation of these signs in total violation of the Township Code and in total disregard of the denial of the zoning permit by the Zoning Officer of the Township of Eagleswood.

I think it's clear case law in New Jersey that a municipality has a right to regulate and even prohibit billboard signs within its boundaries. And the leading case on that would be United Advertising Corp. versus Borough, 11 New Jersey, 144.

Now, this case is cited in State versus Miller, which is 83 New Jersey, 402, which is a 1980 opinion cited by the defendant and the plaintiff in their respective briefs. So there is no doubt that the Township has the right to regulate billboard signs, and

there is no doubt that the fact that the defendant had a prior nonconforming use of the signs does not grant him the right to relocate those signs at his whim or desire in any other portion of the Township.

Second contention that defendant makes is that there has been a selective enforcement of the present zoning ordinances of the Township of Eagleswood. In this regard, I think the burden is on the defendant to prove selective enforcement. It's a heavy burden that's been set forth in the numerous cases on this issue in the State of New Jersey, and unless the defendant is prepared to offer proofs which would satisfy this Court that there has been selective enforcement, that argument has no validity, and the defendant makes one reference to an

individual or corporation that was permitted to construct the sign which the defendant alleges is in violation of the zoning ordinance; however, there is no factual basis or background given concerning this application.

Point three in defendant's brief asserts that he's a candidate for political office, and that the plaintiff is bringing this action as a means of harassment. I for one totally do not understand this argument. The plaintiff is bringing an action to enforce its zoning ordinances, and I do not think that the mere fact an individual against whom the ordinance is sought to be enforced, the fact that he's running for office in any way lessens the responsibility of the Township to enforce its ordinances.

And as has been previously stated,

we're speaking essentially about three billboard signs, two of which have been completed, the third of which as of this date has not been completed. I believe only the poles have been inserted in the ground.

Now, your Honor, I have pictures of these bilboard signs. I believe the defendant does also. And I would show them to the Court, first to the defendant.

MR. BELL: I have no objections.

THE COURT: All right. They can be marked P-1, just tell us how many there are, Mr.-- we'll mark them as a group.

MR. GILMORE: Eight, your Honor.

THE COURT: P-1 then is eight photographs of the signs in question.

(Whereupon above referred to exhibits received and marked P-1 in evidence).

MR. GILMORE: Your Honor, I'd show

these pictures to your Honor, and they show two signs and several poles, in addition to a third sign. Your Honor will note that the two billboard signs that are completely erected deal with commercial advertisement. There is no political advertisement there. One, I believe, is for a housing development--in fact, excuse me, I believe both are for housing developments. One for Tradewinds and the second I believe is a ---

THE COURT: Holly Lake Park.

MR. GILMORE: Holly Lake Park. So the assertions by the defendant that these signs are protected by the First Amendment right of free speech do not apply, your Honor. They are commercial signs selling a commercial product, homes.

THE COURT: Well, Tradewinds is for

furniture?

MR. GILMORE: Oh, excuse me, your Honor, furniture, I'm sorry.

THE COURT: It says Tradewinds Furniture underneath on the sign.

MR. GILMORE: Final argument, or excuse me, the fourth argument made by the defendant is that the zoning ordinance is unconstitutional.

To this end he cites State versus Miller, 83 New Jersey, cited at page 405, but I believe it's 402. It's 402. It's a Supreme Court case decided in 1980, and your Honor I would strenuously argue to the Court if anything, State versus Miller authorizes the action taken by this Township Committee before this Court.

And the portion of that case cited to the Court in the plaintiff's brief, the Court noted that while a municipality

could not prohibit signs of a political nature, that they certainly had the right to regulate those signs. And the Court specifically cites two cases from other jurisdictions. One was State--or excuse me, Baldwin versus Redwood City, where a 16 square foot limitation on signs was held not to offend the First Amendment.

The second case was Ross versus G-O-S-H-I, where it was held that 18 square foot limitation did not violate the First Amendment.

Well, your Honor, in the instant case, this action was brought against the defendant, because he exceeded the permissible size of the sign in an R-2 Residential District. The largest permissible sign is 32 square feet. The defendant has the right to put up a 32 foot--square foot sign in--on this

property and the Township would not even be here if that was the case; however, the defendant has elected to put up a 345 square foot sign in total violation and disregard of the zoning ordinance of the Township of Eagleswood.

I think State versus Miller is clear on the holding that a municipality has the right to regulate signs of a political nature even though we have no such sign before this Court.

As I previously stated, the two signs that have been completed are commercial signs, one selling furniture, one selling homes; but even if they were of political nature, the Township has the right to regulate as long as it is reasonable, and I would submit to the Court that a 32 square foot limitation is reasonable in light of the fact that

two previous cases cited by our Supreme Court upheld a 16 square foot limitation and an 18 square foot limitation.

I would suggest to the Court that the proper remedy here is to grant the plaintiff its relief, to order the defendant within a reasonable time to remove these billboard signs and that's the relief I would ask. Thank you.

MR. BELL: Your Honor, I think first of all--I think I--maybe to set the record straight I would like to ask for certain stipulations of record. I'd like to go down them and see if the attorney for the other side would agree to each one of them as I pick it out.

One would be that both bilboards existed as an act of nonconforming use from 1960 to the time of relocation in 1981.

MR. GILMORE: Your Honor, just to save time, I don't think I'm going to stipulate to everything. I'd let the defendant put on his proofs before the Court. I don't know if I have the knowledge to be able to stipulate many of the allegations that have been made.

MR. BELL: I thought, your Honor, to save the Court's time, there are a list of things here that we're getting a lot of his representations from the attorney for the Township of Eagleswood, and I would like to clear them up.

THE COURT: Well--

MR. BELL: One--

THE COURT: --normally, we do this by affidavit, Mr. Bell. Mr. Gilmore has relied on the affidavits and the pictures that he's served in the file here.

MR. BELL: Mr. Gilmore has already made certain representations in his presentation which are not in the affidavits which are not true and are intentionally made for the purpose of making a court record to make myself appear to be a -- a complete violator. And one of his representations are that I erected a sign as 345 square feet, which is not ture. The--the application which he talks about clearly states two separate signs. He's talking that I applied for three separate signs. Each sign is 192 square feet, which--

MR. GILMORE: Your Honor, I might be able to save some time here. I--I think I understand what the defendant is trying to say here. If your Honor would look at the Exhibit A where it says Plot Plan and it has B, Building,

there are some figures there filled out by the defendant. The first one reads eight feet by twenty-four feet panel.

Now, that would be the actual surface of the sign, itself, and that would come out to 192 square feet; however, next to that is 11 and a half feet by 30 feet overall size and that would be the overall size of the structure which I believed in my presentation to the Court I stated the overall size of the sign structure itself was 345 feet.

Well, 11 and a half feet times 30 feet comes out to 345 feet. So if the defendant is attempting to assert to the Court that the actual size of the sign, itself, disregarding the structure upon which it sits is 192 feet, then I concede the same.

MR. BELL: Your Honor, there are several other things that I would like

to talk about, and that is that there--maybe I should be sworn in for it or not-I don't know-but I--I'd like to point out that both billboards existed as of 1960. The records, and I believe the affidavit, spells it out clear enough with copies of the leases that are attached, dated October. 1960 and April, 1963, as well as the --the easements and the deeds which are attached to the--the brief.

I think that we have a little different situation here than what is being painted in also the effect that we have a situation really that two billboards is what we're really talking about as far as talking about commercial billboard advertising.

The third billboard which the Building Inspector was informed and which we talked about at the date of

the signing of the Order to Show Cause was that the third sign would be used for political advertising for the upcoming senatorial election, that the political advertisement was a temporary nature. At that time, the attorney for the Township admitted to your Honor that the ordinance of Eagleswood Township does not provide for any sign which is for political advertising in any zone, and I might point out that the cites that he is making on the--the sections of the ordinance which he also talks about 103-8, that he's talking about, permits a 32 square foot political sign, does not permit a 32 square foot political signs, but allows signs of a temporary nature that identify in engineering or architectural contractor engaged in construction of a building provided

that the surface of such sign shall not exceed a total of more than 32 square feet in the area and provided that such signs are removed prior to the occupancy of the building. Doesn't allow or even specify that a political advertisement sign can be put up at 32 square feet, and I challenge, nowhere in the ordinance will you find any provision for any freedom of speech, billboards or signs. And I--

THE COURT: Well, where is, Mr. Bell, the political sign that you're referring to? You see, if you've erected a political sign and it's --it's less than 18 square feet, which I think would comply either with the Baldwin versus Redwood City, or State versus Miller, I would--I would sustain your right to do that, but you haven't even done it, have you?

MR. BELL: Your Honor, there's two pilings that were constructed that those pi ctures show that the attorney has presented into evidence.

THE COURT: Well--

MR. BELL: Those two pilings are for the sign that was under construction.

THE COURT: That doesn't look like--

MR. BELL: Not these.

THE COURT: Doesn't look like 18 square feet on that piling.

MR. BELL: No.

THE COURT: I don't know.

MR. BELL: The two pilings here behind that sign that were for--

THE COURT: Here's another one with some pilings.

MR. BELL: Right. These were the ones that were removed.

I'd also like to point out, your Honor, that in this photograph that he

has presented is the other billboard across the street that the other company moved, relocated, reversed direction, which my affidavit refers to. That billboard is 250 square feet; last year was exposed in a new condition with shiny facing of raw steel metal, galvanized metal for a period of over two months, and the Zoning Officer and the Mayor goes by that area on a daily basis, and that they had never interfered with or challenged or did anything with that other company for that sign.

I'd like to also point out--

THE COURT: Wait a minute. Let's finish one thing at a time.

MR. BELL: Okay.

THE COURT: Are you--are you contending, Mr. Bell, that on Exhibit P-1, which is a photograph, and on the

bottom of it has--I don't know what that means, but anyway, on the picture itself, it shows a sign, which some of the other pictures indicate is Holly Lake Park.

Then in back of that sign there are two telephone poles.

MR. BELL: Yes. Utility type poles, your Honor.

THE COURT: All right. Utility type poles. And are you contending that on those two utility type poles you're going to erect a political sign on a temporary basis of less than 18 square feet?

MR. BELL: No, your Honor. My argument is that I'm erecting a larger sign than that. And I'm also arguing, your Honor, that the cases that he cites may be so in those particular cases in that Township, but here we

have a Township that has no provision for any sign of any size for political nature. And now we have a situation that I refer to in my brief in the Metromedia case versus San Diego, which was decided on July 2nd. of this month, that that case set aside the ordinance in San Diego because it did not provide for freedom of speech advertising, and that sign sections were declared unconstitutional. That case is probably the most recent. It is the most one on point when you're getting into the discussion of the political advertising.

We have two types of arguments here, one is the political sign, which is under construction by the two pilings. The other is the other two signs which existed since 1960.

Those two signs were not voluntarily

moved, your Honor. We have a Court Order that has been presented to the Court and the docket number C-3654-78 which clearly show that the one sign was across the boundary, and the survey which your Honor has, shows that that billboard was a hundred and 24 feet at one end and a hundred and nine feet on the other from the property line where it belonged. We have a very simple matter here, and that is that the entire tract was located improperly in 1960. The two billboards that were erected on each end of the tract turned out that where one was on a neighboring piece of property and the other was midway in the existing tract. And your Honor, if you look at the--the easements that are of record show that the easements are on the north and south end of that tract, and that when

we found that they weren't on the easements where we belonged and when we found after we received this survey after the suit was filed in 1978, that in July 1979, when this survey was made, we found that we were not where we were supposed to be and it was a simple matter--it was a mislocation of property. In Southern Ocean County and Southern New Jersey, that is not an unusual situation of having a boundary line problem. So actually we have a situation here that the signs as they presently are after their relocation are where they belonged and where they were paid for to be all these years. And it's not an increase of a nonconforming use. It's not a major change. And it's the same zone that it was in prior to their change of the spot on the property.

THE COURT: What about the B section that says: No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter?

MR. BELL: Your Honor--

THE COURT: Aren't you bound by that?

MR. BELL: There are two arguments on that. One is that section's unconstitutional as applied here. The other is that for an example, it you're to subdivide a piece of land and it's done through a Court Order, under the non-Land Use Law, there is enough case law on it that if a Court decides that the property is to be subdivided, whether it complies with the subdivision requirements or not, that that Court Order bypasses even the use of the Planning Board for such

approvals, even though it may not meet the standards.

I think we have a similar type of situation here. The New Jersey Land Use Law is fairly new, but we have a situation here that these signs were only relocated because of the Court Order that was entered into in 1979 by your Honor. It was not a voluntary thing by myself to come along and just arbitrarily move a sign.

Another thing that the--the Township's position has been is that the signs were moved after a letter of--of--from the Zoning Officer or the attorney for the Zoning Officer, saying that they couldn't be moved. That's not true, your Honor. That the one sign that was across the boundary line and moved to the north was completed prior to the receipt of that letter.

The other sign, which is midway, that was moved to the north end of the tract, had already been over 50% per cent completed, because the pilings were erected there first and it was just a matter of disassembling the lumber and unbolting it and moving the faces to the new site.

So, your Honor, I think that it's a little bit of a different situation, but the case law in the Metromedia case would determine that the third sign which we are erecting would invalidate the entire sign ordinance of Eagleswood Township, because there are no provisions for any freedom of speech advertisements.

I also would like to point out that another argument that should be considered is that under 103-40, nonconforming structures, Section A,

which the Township at this point doesn't want to recognize, that no such structure may be enlarged or altered in any way which increases its nonconformity, but may be enlarged or altered provided that such change does not extend into any front, side, rear yard established by this chapter notwithstanding existing setbacks.

These particular signs in all respects meet all the setback requirements, are not an increase in their nonconformity, or not an enlargement. It's just actually a continuance of a maintaining on that particular piece of property.

I would also like to point out in the New Jersey Land Use Law, Section 40:55D-68, nonconforming structures and uses. Any nonconforming use or structure existing at the time of

passage of an ordinance may be continued upon the lot or in the structure so occupied, and any such structure may be restored or repaired in the event of partial destruction thereof.

I think, your Honor, that--that the relocation of the two signs complies with the New Jersey Land Use Law.

I feel that the ordinance as written and advertised, apparently is--is not in compliance with that Land Use Law, that it goes beyond the authority of the Township in trying to do away with nonconforming uses, or at least as applied by the Township of Eagleswood in this case.

We also have a situation that Eagleswood Township is a very small Township, and I might point out, your Honor, that although we are talking

here about two billboards which are the only two that I own in Eagleswood Township, the Tooker Advertising Company which is a competitive company owns one billboard in that Township, and the R.C. Maxwell Company only owns four billboards in that Township.

And other than that, there are two shelter, bus stop locations, where they put signs on the side of school bus sites. So we really have an area that's a very small town. Its population is very small, and we're not talking about a situation that something that's going to come up everyday. And the billboard across the street that my affidavit refers to, if that company that owns four billboards in that Township which are larger than our billboards can turn that sign around, move it over 300 feet down the

street and completely reconstruct it, that's a brand new sign, and go uninterfered with by the Township, that certainly points out that we are having unequal application of these regulations in that Township. And I feel that's an act of discrimination.

The--another case here that I would like to cite is the Belleville versus Parrillo's Incorporated, 83 New Jersey, 309, 416 A. 2d 388, which is a 1980 case.

The nonconforming use that has not substantial change or enlargement may continue. And I think this case is quite on point in this type of situation.

I would like to ask your Honor, and they're already in the presence of the Court, I would like to ask that be entered into evidence, the survey dated

July 12th.,1979, the advertising contracts currently on the two billboards which show over $4,000 a year income, the lease is dated October 7th.,1960, and April 10th., 1963, and the deed dated February 14th., 1975, and the deed dated May 31st., 1977, and the easement dated May 31st., 1977.

And I point out, your Honor, in the event that this Court should find and any higher Court should find that these two billboards may not be continued, then I would suffer irreparable harm, because I would then own easements on this piece of property that I have paid and given value for will be totally useless, because they're only usable for billboard sites, and there are no other provisions in the easement that they can be used for anything other than billboard sites; and

therefore, I would suffer irreparable harm if that were to be the decision.

I would also like to point out for the record, your Honor, that the Eagleswood Township zoning ordinance is a permissive ordinance and is not a restrictive ordinance. And therefore, because there are no listings in that zoning anywhere that permit commercial freedom of speech advertising or freedom of speech advertising such as political that the ordinance is unconstitutional in the sign sections.

I would also like to point out for the record, your Honor, that Plaintiff Mayor of Eagleswood Township is John Hendrickson and is a Republican candidate for the State Assembly, District 9, for November 3rd., 1981 and I--and the reason I have another one similar to that that I'd like to put

into the record, if you would hold your objection on the two until I state the other one--

MR. GILMORE: Objection--

MR. BELL: --is that the defendant is the Mayor of Stafford Township and the Democratic candidate for State Senate in District 9 on November 3rd., 1981. That the Eagleswood Township and Stafford Township are adjacent Townships to each other. And the reason why I put that forth, your Honor, is because I feel that this entire matter is a -- is a political retaliation--retaliation, and that it's done for political purposes. And my affidavit points that out and the argument in my brief. And I think it's of importance to be on the record.

MR. GILMORE: If I may respond, your Honor.

Your Honor, several statements have been made before this Court by the defendant which I think need clarification.

First of all, there is a reference to the fact that a Court ordered subdivision or I think more properly the word would be partition of a property can take place without any review by Municipal Planning Board, but I would point out to theCourt that this is so because it is a specific Statutory exception in the Land Use Act, itself.

One of the enumerated exceptions where one does not have to go before the Municipal Planning Board is a Court ordered partition.

Second of all, your Honor, reference has been made to Section 108.40, Subsection A; however, in construing

that section, one has to read the preceding language which states: Where a lawful structure exists at the effective date of adoption of this chapter that could not be builtunder the terms of this chapter by reason of restrictions on lot area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure may be continued and then the provisions continue. It does not deal with a nonconforming use at all. The use of the property does not cover a prohibited use which we have here.

Again, I would point out to your Honor that the Township has never taken a position that the defendant cannot erect political signs on his property or any property he has easements on. The sole position of the Township as is

evidenced in its letter which is attached to exhibit--as Exhibit C to the complaint is that he cannot construct the sign larger than 32 square feet, which is double the size of a sign that was held not to violate the First Amendment right of free speech in Baldwin versus Redwood City. There, the sign was 16 square feet. Here, we allow double the amount, 32 square feet.

I've never made a representation to this Court that the ordinance specificaly says 32 square feet for a political sign. What I said to the Court was the largest sign permissible in the R-2 Residential Area is 32 square feet.

The Township Committee takes the position that political free speech can take place by the erection of signs of

any portion, any district of the Township, as long as it conforms to the sign requirement sizes for that district. And I think that it can be amiably upheld under State versus Miller.

The arguments of the defendants that the signs were not properly located when they were installed and that he's going to suffer injury now if this Court orders a removal from my position, your Honor, that's partly the defendant's fault. There's no indication in any affidavit before this Court that the defendant had a survey performed when he erected these signs to be sure that he was erecting them on his property, nd if, in fact, such a survey was made, then I would suggest to this Court if this defendant is damaged, his appropriate relief is

against the surveyor. But the Township has ordinances, adopted its ordinances, in conformance with the Land Use Law and has a right to have those ordinances enforced.

THE COURT: This is the return day of an Order to Show Cause brought by the Township of Eagleswood, a municipal corporation of the State of New Jersey against Wesley K. Bell.

The relief sought in the complaint is the removal of billboard signs and restraining the defendant from taking any action to relocate these signs in violation of the provisions of the Township Code of the Township of Eagleswood. There were additional reliefs sought, but I don't believe there's been any proof as to any compensatory or punitive damages. So I would deny any relief sought along

those lines.

The remaining question then is to the rights of the plaintiff to require the defendant to remove the signs referred to and to prevent the relocation of any billboard signs.

The history here indicates that the defendant had two signs on the northerly side of Route 9 in Eagleswood Township. His affidavits indicate that apparently they were mislocated and that in an action brought before the Court they were ordered to be removed from the place they were on, because the defendant had no right to locate them initially on that property.

The defendant then unilaterally relocated the signs on property in the Township that was also residential.

The initial location of the signs was a nonconforming use, because they were

signs, commercial signs, located in a residential zone.

As long as they remained where they initially were, plaintiff had a right--defendant had a right to leave them there; but when he went to relocate them, the municipality said he then must obtain a permit and conform with the Zoning Code of the Township of Eagleswood. He didn't do that--or he attempted to do that and a permit was denied, so he in effect never got the permission of the proper municipal officials to relocate the signs.

The zoning provision Article Six refers to nonconforming use and Section 103.39B reads and I'll quote: No such nonconforming use shall be moved in whole or in part to any other portion of thelot or parcel occupied by such use at the effective date of the

adoption of this chapter.

And here there was an attempt to relocate the sign without first getting the municipal approval. And I find that that is in violation of the municipal ordinance, and therefore, I will order that the two signs which are presently relocated and which have commercial information on them, one is an advertisement, Holly Lake Park, that's how I'll identify that sign. That should be removed. And the other one has the information on it, Tradewinds Furniture; but again, that's a commercial sign. It's been relocated and it's in a residential zone without obtaining first the permission of the proper municipal officers.

Now, Mr. Bell refers to a political sign that he intends to erect which is two--or which--for which there are two

utility type poles to the rear, I'll call it the rear, or the rear face of the sign that I previously referred to which has the commercial information on it, Holly Lake Park.

The Township does not object to him putting a temporary political sign there, but requires that the sign conform to the general requirement of no more than 32 square feet in square footage, or 32 square feet in area. And I will allow Mr. Bell on a temporary basis to install a political sign as long as it doesn't exceed 32 square feet in area on the position that I've referred to in the rear of the Holly Lake Park, and I--I believe that when we say 32 square feet, we're referring to the outside dimension.

Mr. Bell made a point of the difference between the actual sign,

itself, and the overall framework; but I think the ordinance means that the overall frame, the outside dimensions of the whole thing, must be less than 32 square feet. So that he may do that on a temporary basis and insert a political sign since Mr. Bell is running for political office.

I base that on the case of State versus Miller, which is 83 New Jersey, 405, which I believe referred to a square foot area of six--of 18 feet, and the State--the case of Baldwin versus Redwood City where the Court held that the municipality could regulate up to or--or anything above 16 square feet for a political sign. Anything less than that could be established. Anything above it if the municipality said it was illegal or against its zoning was proper to

regulate. So I think the municipality here is doubling the areastandards of the Baldwin versus Redwood City, and not quite doubling the area allowed under State versus Miller.

So--so my ruling then is to remove the two signs that--and the posts and utility poles and all the rest of it on which there is Holly Lake Park sign, commercial sign, and the other one which says Tradewinds Furniture; but that he can use the two utility poles that he's referred to to the rear of the Holly Lake Park sign for a political--temporary political sign not to exceed 32 square feet in area.

I'd ask Mr. Gilmore to prepare the form of the judgment, submit it to Mr. Bell, and I would grant the request that he not locate any other signs or erect any other signs in the

commercial--in a residential area without first complying with the local ordinances.

MR. BELL: Your Honor, I have a couple of questions on your ruling. One is doI interpret your ruling by--or I should say, do I interpret your ruling that in effect you have written or created a new permitted use in the sign section?

THE COURT: Well, I don't think I have to answer that, Mr. Bell. Actually, there is no sign--political sign that you've actually attempted to install; but the municipality has said they will permit you to install a political sign on a temporary basis in a residential zone as long as it's less than 32 square feet. And that's my --my ruling. I will allow you to do that. I will not prohibit them or will

restrict them from prohibiting you from doing it.

MR. BELL: Well, another part that I'm not quite sure of your ruling is that are you limiting me to one 32 square foot sign within the Township limits, or may I put as many 32 foot square political signs as I choose?

In most Townships at election time if you've noticed that there are more than one sign located throughout the Township. On this particular site can I put up one for Florio for Governor, one for the Assemblymen, one for the Freeholders, one for the local candidate and one for myself?

THE COURT: I don't know if that's in issue before me.

MR. GILMORE: Your Honor, that is not an issue before you.

THE COURT: How many--

MR. BELL: Well, your Honor, the reason I say that I thought you were limiting the ruling to one particular -- one 32 square foot sign.

THE COURT: Well, I am limiting my ruling to the two utility poles that you have referred to in--in issue, but--

MR. BELL: It's possible, your Honor, to put more than one sign on those poles.

THE COURT: Well, I don't know that I'm prepared, really, to rule on how many 32 foot square political signs on a temporary basis you can put up. If--if there is a limitation--

MR. BELL: Well, your Honor--

MR. GILMORE: Your Honor--

THE COURT: --I don't know, I'd have to study the cases more closely.

MR. GILMORE: My concern on that,

your Honor, would be if you put 11 your 32 foot signs together, you could end up with a sign of 1600 square feet footage the---

MR. BELL: Not if there's a space between each one.

MR. GILMORE: Your Honor, the entire justification behind the upholding of restrictions on billboards or other signs is the fact that municipalities could take aesthetics into consideration in the zoning ordinances, and while the Courts have held that you cannot restrict freedom of speech, every case that's been decided upholding the right of free speech and authorizing the placement of signs has always dealt with one sign. I know of no case before that's been cited by the defendant or any cases cited in State versus Miller that dealt with more than

one sign.

THE COURT: Well, that's why I'm not really prepared to answer Mr. Bell on that question. I would think another thing, of course, is safety. Some of these signs have some overlap into driving and overall safety, but in any event, my specific ruling, Mr. Bell, as to the two utility poles that you brought to my attention that I've referred to back of the Holly Lake Park sign, and you've indicated that you intend to use those for a political sign and I have upheld your right to do that as long as that political sign does not exceed 32 square feet in overall dimension.

MR. BELL: All right. Thank you, your Honor.

I have two more questions, your Honor. One is: I'd like to request a

15 day extension to file an Answer on this complaint because I found the other day that I actually hadn't filed the Answer in the required time.

THE COURT: Well, is there anything still pending under this ruling? I think this disposes of the case.

MR. GILMORE: Yes, it does, your Honor.

MR. BELL: What I'd also like to ask, your Honor, is stay of the judgment pending a final outcome of an appeal in this matter on the two existing billboards because I intend to file an appeal and take it as high as I can take it, and I don't feel that it's right that I have two existing customers on billboards that have been there since 1960 that I should have to remove them at a later date, possibly be able to reconstruct them and then

have to come back and sue the Township for the damages of the loss of income and the cost of removal and reconstruction.

MR. GILMORE: Your Honor--

MR. BELL: It's a major undertaking for such a cost, $4,000 a year is a major amount of money per year. If an appeal should take a year for an example there's $4,000 in loss of income, not counting on the cost of removal and reconstruction of those billboards. And I--I feel, your Honor that the San Diego case, the Metromedia case, because the opinion has not been published yet has not been given enough consideration today, and I feel that a--that a higher Court should be able to review that. And I--I respectfully submit that request, your Honor.

MR. GILMORE: Your Honor, if I may

respond.

Your Honor, I was going to ask that your Honor set a time period for these signs to be removed, and I was going to request that your Honor set a 20 day period. The reason I set forth the 20 day period is that in the partial judgment which the defendant has submitted to this Court and upon which he relied set a similar 20 day limit. I would argue to the Court that this Court should not stay its decision that if the defendant is required to remove the signs within 20 days that gives him ample time to make the appropriate application to the Appellate Division, and if the Appellate Division sees fit, they can issue their own sign.

THE COURT: Well, Mr. Bell, don't you feel that if you win on appeal you can get all the damages you feel you're

entitled to from the municipality? And if they are requesting that the sign be removed that then just keep tract of the costs of removing the signs by you and that you have a financially responsible plaintiff here if you're right and I'm reversed on appeal for whom you can recover your damages and--

MR. BELL: Your Honor, I--

THE COURT: --I don't see then why--why I should stay my--my judgment.

I might mention that I never enter a stay until the Notice of Appeal is filed. Otherwise, I'm just staying my own judgment; but if you file a Notice of Appeal, I think, and the Township wants the signs down within the 20 days--and by the way, I think that's a reasonable length of time, and I'm sure I mentioned in the decision either that I don't find any selective enforcement.

I don't find any proof sufficient to find that as a valid argument. I don't know if I mentioned that, but the 20 days should give you time enough to file your Notice of Appeal, and then if the Appellate Division feels that monitary damages wouldn't recompense you if you're right, then they can grant you a stay; but I don't see in this type of a situation there would be any irreparable harm to you by requiring you to take them down.

On the other hand, if --if I'm affirmed, I just had a case come back to the Appellate Division, took two years. So that would mean that from one to two years this sign would still be there even though the Appellate Division had affirmed me. And--

MR. BELL: Well your Honor, that the--

THE COURT: I don't think that would be right, since--especially since if I'm wrong, you can get whatever monetary damages you're entitled to.

MR. BELL: Your Honor, in another case, that is pending before the Third Circuit Court of Appeals later this month, I might point out which is the 21st. of this month, there is already accumulated over one million dollars in damages and loss of income against the State of New Jersey, in another matter which has spanned a 14 year period. We've reached the point in that case that - you know- that not only keeping track of damages, not having that income in itself is a tremendous problem to me as an operating business individual. And accumulating of these type of--of losses, especially where you have a permanent easement and you

have a situation that--that you have an income that is established for your lifetime, to have somebody step in and take that away at $4,000 here and $10,000 there and $20,000 somewhere else, it accumulates and it makes it very difficult to even exist.

One of the things that I would also like to ask your Honor is that I made a request and I don't know whether I understood your ruling that the contracts, the leases, and the easements were a part of the record. Certain documents.

THE COURT: Well, anything that you wish to make part of the record you should then, I think, be offered in evidence. If Mr. Gilmore doesn't have an objection, you can mark them in evidence.

MR. BELL: He did. I offered that,

your Honor, and I don't think he really objected to it and I would like to have those documents made part of the record so that on appeal that they can't be argued that they can't be used.

THE COURT: All right. Well, then I think the proper way to handle that is for you to offer them in evidence.

MR. GILMORE: Well, your Honor, I believe those documents- and correct me if I'm wrong, Mr. Bell-but I believe those documents are attached to your affidavit.

MR. BELL: Yes.

MR. GILMORE: Then they are part of the record, your Honor.

THE COURT: All right.

MR. BELL: Except for the Court Order which I gave your Honor which I cited in the record the Docket Number C-3654-78, and the --

MR. GILMORE: No objection, your Honor--

MR. BELL: --survey.

THE COURT: All right. Well, then -- then if that's another document, then at least give that one to the reporter and that could be marked D-1, that judgment, and the survey. Mr. Gilmore, any objection?

MR. GILMORE: No objection.

THE COURT: And the survey would be D-2, then D-1 and D-2 should be marked in evidence and I'll answer your other points once the reporter marks those.

(Whereupon above referred to exhibits received and marked D-1 and D-2 in evidence respectively.)

THE COURT: D, right?

THE REPORTER: Yes.

MR. BELL: Would it be necessary, your Honor, that--to give a number to

the contracts and the other things which are in the brief, or would it be sufficient-- MR. GILMORE: They're attached to the affidavit, your Honor. They're part of the record.

THE COURT: Mr. Gilmore's accepting anything that was attached to the affidavits as part of the record. So on appeal you'd have that as part of the record.

MR. BELL: Thank you, your Honor.

THE COURT: Now, your other point about the -- some Federal case and moneys that you contend you're entitled to, I don't know all the facts in that. I'm not sure if I know any of them, but I don't know all of them.

So I don't know how to answer that, or I'm not prepared to answer that.

As far as this case is concerned, I think it's very easy for you to keep

track of whatever losses you have incurred and that's one reason why I say I don't think a stay should be granted. You've got your rental. You know what that is. You're in the business of erecting or--and also I think capable of demolishing a sign and if you're not, then keep the bills and expenses that you incur in demolishing these signs. You've got your rental records, your lease records, and I think it's no--no difficult problem for you to keep track of your damages in the event that the Appellate Division agrees with you.

On the other hand, if they agree with me, then these signs have been there for a year to two years against my order and against the wishes of the municipality. So I think when you weigh those factors that the stay

should not be granted.

MR. BELL: Your Honor--

THE COURT: And I also tell you, of course, that since I will probably refuse it and I don't refuse it as I told you until you file the Notice of Appeal, but once you file the Notice of Appeal, and I refuse it, then you have a right to go to the Appellate Division and they can always grant it even though I've removed it.

MR. BELL: Your Honor, one of the other points I'd like to make is there are a couple other cases that have been pending which are a problem because I have been unable to perform certain work by certain deadlines. I've been very busy. I've been backed up, and trying to reach the point where I can go out and start campaigning on a daily basis seven days a week from now till

November's election.

Any--any Court Order which would force me to remove these signs is going to take part of that time away from my current completion schedules as well as taking away time from my campaigning for public office. And I think that any Court Order that would request that these signs be removed should at least be held up until after the November election.

THE COURT: No. I don't agree with that. As I said before, if you don't want to do it yourself or can't do it yourself, then you hire someone to do it for you. Keep track of your expenses, and if you're right, you can ask--and the Appellate Division agrees with you and if they want, they can incorporate what expenses you have incurred in complying with my order as

part of your rights of recovery against the municipality, or you can make that application.

So I not inclined to grant you a stay, but as I said and I'll repeat it once more, and no more, that you first must file your Notice of Appeal. Otherwise, I'm just staying my own Order for nothing.

Would you prepare the form of the judgment, Mr. Gilmore?

MR. GILMORE: Yes, I will, your Honor.

THE COURT: Submit it to Mr. Bell under our Five Day Rule and I'd like the Order within ten days.

MR. GILMORE: And that Order will provide that the two signs you've ordered to be removed within 20 days of your Honor executing.

THE COURT: That's correct. And I'll

return the exhibits that we have marked in evidence.

(Whereupon motion was concluded)

CERTIFICATE

I, DAYETTE J. ZAMPOLIN, a Certified Shorthand Reporter and Notary Public of the State of New Jersey certify that the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

DAYETTE J.ZAMPOLIN,CSR.

Official Court Reporter

DATE: 10/30/81

SUPERIOR COURT OF NEW JERSEY

OCEAN COUNTY - CHANCERY DIV.

DOCKET NO. C-4054-80

APPEAL NO. A-00428-81T02

TWP. OF EAGLESWOOD,
Plaintiff,

v.

WESLEY K. BELL,
Defendant.

TRANSCRIPT
OF
PROCEEDINGS

BEFORE: HONORABLE HENRY H. WILEY, J.S.C.
Ocean County Courthouse'
Toms River, New Jersey
July 22nd., 1981

APPEARANCES: WESLEY K. BELL,
Defendant Pro Se

ORDERED FOR APPEAL BY:
DANIEL SUGRUE, ESQ.

Rec'd 11/3/81
Shuman & Butz

DAYETTE J. ZAMPOLIN, CSR
Ocean County Courthouse
Toms River, New Jersey

MR. BELL: Yes, your Honor.

THE COURT: I received a letter from you, Mr. Bell, on July 13th., as to the form of the Order. The first paragraph says the Order has no finding that the Court finds that the billboards in question have lost their nonconforming use as a result of their relocation.

MR. BELL: Your Honor, the reason --

THE COURT: I don't think that's an issue before me or wasn't before me, whether the boards -- the billboards in their new location have lost their nonconforming use or they have not--wasn't in issue. The issue was whether you could relocate them pursuant to the ordinance. So I'm not going to make that finding, because it's not--wasn't part of the case.

MR. BELL: Your Honor, the testimony was that the signs were there at a

prior date and that they maintained a nonconforming use. The brief that was submitted to your Honor pointed out about the relocation of the billboards, and I think that was a very clear question that the Appellate Division's going to have to determine in this case. Is, in fact, does a nonconforming use lose its nonconforming use if it's moved by Court Order or whether it's moved a distance of a hundred and 32 feet or 50 feet or whatever it would be in these cases.

There was also submitted affidavits about the billboard across the highway that was moved 325 feet that did not--did not come into any action by the Township Committee and it was permitted and I felt that they were important part that should be included in the Order, those findings.

THE COURT: Well, I disagree. My finding was that the ordinance did not allow you to do what you did here. So I'm not making any more of a finding than that.

Two, the--your second paragraph says the Order has no finding as to the discrimination in which the ordinance is applied to others as it is being applied to this defendant even though no proofs were placed into the record in opposition to defendant's affidavits.

Again, I'm not satisfied with any proof that there was any discrimination against you in this case. I don't --don't recall that really being in issue, except your reference to other signs which might be not really discrimination, but--I'm trying to think of the term, enforcement.

MR. BELL: Unequal enforcement.

THE COURT: Or unequal enforcement or something like that.

Whatever's in the record is in the record. I didn't make any findings or I don't believe and I don't find there was any discrimination against you. So I don't think that's in the--as part of the case or needs to be any finding on that.

Thirdly, the Order has no findings that the ordinance permits political billboards up to 32 square feet as the Judge stated from the bench, even though the politicial billboard under construction is 96 square feet. Well, I didn't make a finding on that, but the attorney for the Township stated, and I assume he would be bound by his statement, that they, that is the Township, would allow political signs

up to 32 square feet. That was what he said. So that's in the record, and you can get the transcript of the record for that information on appeal if you think you need it. But I didn't make any finding like that. And I agree with that and I don't intend to--and the--

MR. BELL: The argument before your Honor at that point was that--that the ordinance didn't even permit 32 square feet political billboards and that the sign under construction was 96 square feet and that that was part of the argument of the case, and I think that that is a very major part that the Appellate Division will be involved in, because this is an emergent matter when it goes to the Appellate Division, because it's an election matter of an upcoming election which I'm a candidate

for the State of New Jersey State Senate and that is going to be the part of the case that makes it emergent, that that billboard is under construction and should be decided by the Courts before the election so that the benefit of that sign on be utilized.

THE COURT: Well, I'll repeat myself. The attorney for the Township, Mr. Gilmore, stated that the Township's position was that the ordinance permitted political signs up to 32 square feet. That was their interpretation and that if you used a sign 32 square feet for political reasons, you would have a right to do that.

Now, that's their position. I don't give advisory opinions. If they interpret the ordinance that way and

they will let you do it that way, then you can do it that way.

MR. BELL: But your Honor--

THE COURT: So I think that that's part of the record and you have a right to do that; but that wasn't an issue before me in my opinion, and I'm not deciding that anyway, because I don't think there's anything before me that indicates that you put up a political sign and they took down a political sign of yours. So I'm not going to give an advisory opinion on what--

MR. BELL: The brief--the brief in the argument in the case was that, in fact, that third sign was to be a political sign, that it was to be 96 square feet, and they argue that the ordinance permitted 32 square feet when, in fact, it doesn't. I realize your Honor made the decision on the

basis of that consenting that it permitted 32 square feet, but the ordinance was very clear that it did not permit political signs of any size, and therefore that is a question that the Appellate Division will have to get into. In fact, if the ordinance does permit political signs and then if it does limit it to 32 square feet instead of the 96 square feet which this sign is under constructin for-

THE COURT: Well, there was no issue as to a political sign being removed or taken down. That was not before me.

The Township Attorney, Mr. Gilmore, said that the Township's position would be that their ordinance would permit up to 32 square feet of political sign, and that's a position, if taken, that's on the record, and you can get a copy of that transcript. And other than

that, I don't think that's in issue. So I'm not going to make any finding the way you're requesting on that.

And the fourth one, the Order has no finding that the plaintiffs are not persecuting defendant as a result of political harassment. Well, I denied that--that finding. I don't recall that really being in issue either. I didn't find any political harassment either, but I don't think that was in issue before me.

The question was whether this sign violated the ordinance and I found that it did. So I'm not going to make any further finding as to that either, so I'll sign the Order.

MR. BELL: Okay, your Honor. The affidavits though were pretty clear, I felt, in the case that indicated that there was discrimination and that

the--that the Mayor of Eagleswood Township was on the opposite political ticket which I think was a part of the case, and is an important part of the case.

THE COURT: No. I don't agree with you. The question was that could that billboard remain, I found it violated the ordinance, and I don't think the issue was on political harassment or whatever you have. So I don't find that to be in issue. So I'm signing the Order and I'll--you can get a copy of it. Mrs. Bedell will do the filing and you can get a file copy. All right. (Whereupon motion was concluded.)

CERTIFICATE

I, DAYETTE J. ZAMPOLIN, a Certified Shorthand Reporter and Notary Public of the State of New Jersey certify that

the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

DAYETTE J. ZAMPOLIN, CSR.

Official Court Reporter

DATE: ?/?/81

COMPETITOR'S BILLBOARD

ESCAPES ZONING ENFORCEMENT

Republican ad for Legislative Candidates includes Eagleswood Township Mayor, John Hendrickson for Assembly (1981).

PHOTO shows contested billboard (on left) with Bar in background and R.C. MAXWELL billboard across the highway, which was moved without any Township interference and continues to exist.

NEW JERSEY SUPREME COURT

TRENTON, NEW JERSEY

DOCKET NO. 21,678

TWP. OF EAGLESWOOD, Plaintiff

v.

WESLEY K. BELL, Defendant

Defendants Motion to Stay Judgment pending final determination of Appeal from orders entered in the New Jersey Superior Court by Judge Henry H. Wiley, J.S.C., on July 22nd., 1981 and October 6th., 1981 and the interlocutory order in this matter, filed on September 24th. 1981.

WESLEY K. BELL,
Pro Se
188 Rt. 72, Box 538
Manahawkin, N.J.
08050
609-597-3222

Rec'd 12/20/83
N.J.Supreme Ct.

NEW JERSEY SUPREME COURT

Trenton, New Jersey

Docket No. 21,678

TOWNSHIP OF EAGLESWOOD

Plaintiff,

v.

WESLEY K. BELL,

Defendant.

Motion to Stay Penalty
& Collection Thereof,
Pending Appeal.

The defendant appellant, Wesley K. Bell, has posted, with the Ocean County Sheriff's Office, the sum of $3,000.00, in lieu of a cash bond, pending final outcome of defendant's appeal to the United States Supreme Court, in this matter.

The above obligor, in order to more fully secure the plaintiff, pledges as

security thereof, the full amount of bond on deposit in trust with the said Ocean County Sheriffs Office.

Upon final disposition of this matter with the United States Supreme Court, defendant binds himself and his successors, firmly by these presents.

Sealed with our seal and dated this 20th. day of December, in our Lord, One Thousand Nine Hundred and Eighty Three.

WESLEY K. BELL/s/

Dorothy H. Warren/s/

Sworn & subscribed

Notary Public N.J.

Law Offices
LAWRENCE SILVER
850 West Bay Avenue
P.O.Box 549
Barnegat, New Jersey 08005

November 21st.,1983

Sheriff, Ocean County
Court House
Toms River,N.J. 08753

Re: Eagleswood v. Bell
Docket #C-5599-81

Dear Sir:

Enclosed please find my Trust Check in the amount of $3,000.00 in the within matter to be held by the Sheriff in lieu of a cash bond pending final outcome of Mr. Bell's appeal to the United States Supreme Court.

If this money is to be held on any other basis by the Sheriff or to be treated in any fashion other than a

cash bond in lieu of appeal, it is herein "Demanded" that the said check be returned to me.

Please make the acceptance by signing the bottom of this letter as to the terms expressed herein.

Sincerely

LAWRENCE SILVER/s/

CERTIFICATION OF SERVICE

I, Wesley K. Bell, appellant in the entitled cause, hereby certify that on the 20th., day of December, 1983, sent a copy of this motion to stay the judgment and notice of appeal to plaintiffs attorney.

The above notices were served by Certified Mail upon Gilmore and Monahan, Esquires, at 9 Allen Street, Toms River, New Jersey 08753 and to the Ocean County Sheriffs Office, Hooper Avenue, Toms River, New Jersey 08753.

WESLEY K. BELL, Pro Se /s/

FILED: July 22nd.,1981

HENRY H. WILEY, J.S.C.

SUPERIOR COURT OF N.J.

CHANCERY DIV. OCEAN CO.

DOCKET NO.C4054-80

CIVIL ACTION ORDER

Plaintiff,

TOWNSHIP OF EAGLESWOOD,a municipal corp.of N.J.

vs.

Defendant

WESLEY K. BELL

This matter being opened to the Court by Hiering, Gilmore & Monahan, attorneys for the plaintiff, Township of Eagleswood, and in the presence of the defendant, Wesley K. Bell, pro se, and the Court having considered the verified complaint, affidavits and briefs submitted by the parties,

together with the arguments of the parties, and for good cause shown;

It is on this 22nd. day of July, 1981, ORDERED as follows:

1. That the defendant, Wesley K. Bell, is hereby ordered to remove the two billboard signs, identified by their advertising for (1) Holly Lake Park and (2) Trade Winds Furniture, within twenty (20) days of the date of this order. Said signs to be completely removed from the subject premises within said time period.

2. In regard to the two poles erected by the defendant, Wesley K. Bell, to the rear of the Holly Lake Park billboard sign, the same may be used by the defendant for the purposes of displaying a temporary, political sign, provided that that sign shall not exceed 32 square feet in over-all

dimension.

3. That the defendant, Wesley K. Bell, is hereby restrained from erecting any other signs which do not comply with the zoning ordinance of the Township of Eagleswood.

HENRY H. WILEY/s/

SUPERIOR COURT OF N.J.

CHANCERY DIV. OCEAN CO.

DOCKET NO.-C 4054-80

Plaintiff	CIVIL ACTION
TWP.OF EAGLESWOOD	Order Finding
a municipal corp.	The Defendant
of the State of	in Violation of
New Jersey	Court Order dated
	7/22/81 &
	Requiring
	Certain Actions by
	the Defendant

vs.

Defendant

WESLEY K. BELL.

FILED: 9/24/81

HENRY H.WILEY,J.S.C.

This matter being opened to the Court by Hiering, Gilmore & Monahan, P.A.,

attorneys for the plaintiff, Township of Eagleswood, and in the presence of Schuman & Butz, Esqs., attorneys for the defendant, Wesley K. Bell, Daniel Sugrue, Esq. appearing and the Court having reviewed the affidavits submitted by the parties and the arguments of counsel, and for good cause shown;

It is on this 24th. day of September, 1981, ORDERED as follows:

1. That the defendant, Wesley K. Bell, is in violation of this Court's order, dated July 22nd.,1981, which required the removal of two billboard signs which were erected in violation of the zoning ordinance of the Township of Eagleswood.

2. That this Court does impose a fine of $50.00 per day, commencing September 22nd,1981, and continuing

each and every day that the defendant, Wesley K. Bell, fails to remove the two billboard signs in compliance with this Court's order dated July 22,1981.

It is further ORDERED that the defendant, Wesley K. Bell, has ten (10) days from September 22, 1981, to remove said signs and that this Court continue the plaintiff's motion seeking the incarceration of the defendant until October 1, 1981, at which time this Court will consider the incarceration of the defendant if he has failed to comply with the orders of this Court requiring the removal of the two billboard signs as is set forth in the Court order dated July 22, 1981.

It is further ORDERED that the plaintiff give notice to said Wesley K. Bell, through his attorneys Schuman & Butz, if said billboard signs are not

removed by September 28th.,1981, that said plaintiff on October, 1981, will seek the incarceration of the defendant until such time as he complies with the orders of this court requiring the removal of said two billboard signs.

It is further ORDERED that the application of the defendant for a temporary stay of this Court's order dated July 22, 1981 is hereby denied.

HENRY H. WILEY,J.S.C./s/

SUPREME COURT OF NEW JERSEY

DOCKET NO.

TWP. OF EAGLESWOOD
a municipal corporation of
State of New Jersey
Plaintiff-Respondent

v.

WESLEY K. BELL,
Defendant-Respondent

CIVIL ACTION
ORDER ON APPLICATION FOR
STAY UNDER R. 2:9-8
FILED: 10/2/81
DANIEL J. O'HERN,
ASSOCIATE JUSTICE

This matter having come before the Court on application for a stay by a

single justice of the Court until the full Court acts upon the application, and having read and considered the briefs and affidavits submitted by the parties, and it appearing that the principal ground for the stay is economic loss alleged by the defendant, and it further appearing that the trial court has made provision for constitutionally protected expression of political speech,

IT IS, on this 2nd. day of October, 1981, ORDERED that defendant Wesley K. Bell's application for a single justice stay be and the same is hereby denied.

DANIEL J.O'HERN/s/

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO. C 4054-80

Plantiff,

TOWNSHIP OF EAGLESWOOD, a
municipal corporation of
the State of New Jersey

vs.

Defendant,

WESLEY K. BELL.

CIVIL ACTION

ORDER

FILED: 10/6/81

HENRY H. WILEY, J.S.C.

This matter being opened to the Court by Hiering, Gilmore & Monahan, P.A., attorney for plaintiff, Township of Eagleswood, on an application to enforce litigant's rights and seeking

the incarceration of defendant, Wesley K. Bell, until such time as he complied with the Order of this Court dated July 22nd.,1981, and in the presence of Schuman & Butz, Esqs., attorneys for the defendant, Wesley K. Bell, Daniel Sugrue, Esq. appearing, and the Court having considered the arguments of counsel and having considered the representation of Daniel Sugrue, Esq. that immediate application was being made to the New Jersey Supreme Court for a stay of the July 22, 1981 Order, and for good cause shown;

It is on this 6th. day of October, 1981, ORDERED as follows:

1. That the plaintiff's application to enforce litigant's rights by seeking the incarceration of the defendant, Wesley K. Bell, until he complies with this Court's order dated July 22, 1981,

is hereby continued until Tuesday, October 13th.,1981, at 9:00a.m., at which time this Court will hear the application for the incarceration of said defendant, Wesley K. Bell.

2. That the defendant, Wesley K. Bell, personally appear in Court on Tuesday, October 13th.,1981 at 9:00a.m., and show cause why he should not be incarcerated until he complies with the Order of this Court dated July 22nd.,1981, subject to the provisions of para.1 & 3.

3. That in the event that an application is made to the New Jersey Supreme Court for a stay prior to October 13,1981, and said Supreme Court has not rendered an opinion in regard to said application or has granted a stay of this Court's order dated July 22, 1981, then and in that event the

hearing date of October 13, 1981 set forth herein shall be adjourned until further order of this Court.

HENRY H. WILEY/s/

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO: C-4054-80

Plaintiff,

TWP. OF EAGLESWOOD, a
municipal corporation of
the State of N.J.

vs.

Defendant,

WESLEY K. BELL.

CIVIL ACTION

ORDER

FILED: 10/19/81

HENRY H. WILEY,J.S.C.

This matter being opened to the Court by Hiering, Gilmore & Monahan, P.A., attorneys for the plaintiff, Township of Eagleswood, and in the presence of

the defendant, Wesley K. Bell, and his attorneys Schuman & Butz, Daniel Sugrue, Esq. appearing, on the continued date of a motion to enforce litigant's rights, and the defendant, Wesley K. Bell, having taken the stand, under oath, and representing to the Court that he will dismantle and remove the two billboard signs in question, as set forth in this Court's order dated July 22, 1981, prior to Wednesday, October 21, 1981, and the Court having considered the arguments of counsel and for good cause shown;

It is on this 19th. day of October, 1981, ORDERED as follows:

1. That the defendant Wesley K. Bell, upon his representation that he will remove the billboard signs and structures in question, shall have until 9:00a.m., Wednesday, October 21,

1981 to remove and dismantle said billboard signs and structures.

2. In the event said billboard signs are not removed in accordance with Paragraph 1 of this order, said Wesley K. Bell shall appear before this Court on Wednesday, October 21, 1981, at 9:00a.m. to explain to the Court why said billboard signs and structures have not been removed.

3. That this Court continues the $50.00 per day fine it imposed against the defendant by order dated September 24, 1981, until said billboard signs and stru ctures are dismantled and removed from their present location.

4. That this matter is continued until Wednesday, October 21, 1981, at 9:00a.m., at which time this Court shall set the amount due and owing the Township of Eagleswood, in regard to

the $50.00 per day fine imposed against the defendant, Wesley K. Bell, from September 22, 1981 until the date the billboard signs in question are removed and dismantled. In addition this Court will entertain the application for an award of Court costs to the plaintiff in accordance with the demand for relief set forth in its complaint. The defendant has the right to submit any legal argument he so desires in regard to the setting of the fees due the Township of Eagleswood in regard to said $50.00 per day and in regard to Court costs.

HENRY H. WILEY/s/

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO. C-4054-80

Plaintiff,

TWP. OF EAGLESWOOD, a
municipal corporation of
the State of New Jersey

vs.

Defendant,

WESLEY K. BELL

CIVIL ACTION

JUDGMENT

FILED: 10/21/81

HENRY H. WILEY,J.S.C.

This matter being opened to the Court by Hiering, Gilmore & Monahan, P.A., attorneys for the plaintiff, Township of Eagleswood, and in the presence of

Schuman & Butz, Esqs., attorneys for the defendant, Daniel Sugrue, Esq. appearing, on an application of the plaintiff to have the Court set the amount due plaintiff in regard to the enforcement of litigant's rights which resulted in a $50.00 a day penalty being assessed against the defendant for failing to comply with a previous Court order and the Court having considered the affidavit submitted in support of the application, as well as the arguments of counsel;

It is on this 21st. day of October, 1981, ADJUDGED that this Court does hereby award the plaintiff, Township of Eagleswood, a judgment against defendant, Wesley K. Bell, in the amount of $1,500.00.

HENRY H. WILEY/s/

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO. C-4054-80

Plaintiff,

TOWNSHIP OF EAGLESWOOD

a municipal corporation

of State of New Jersey

vs.

Defendant,

WESLEY K. BELL.

CIVIL ACTION

ORDER

FILED: 10/22/81

HENRY H. WILEY,J.S.C.

This matter being opened to the Court by Hiering, Gilmore & Monahan, P.A., attorneys for the plaintiff, Township of Eagleswood, and in the presence of Schuman and Butz, Esqs., attorneys for

the defendant, Wesley K. Bell, Daniel Sugrue, Esq. appearing, on the continued date of a motion to enforce litigant's rights, and it appearing to the Court from the testimony presented by the plaintiff that the defendant, Wesley K. Bell, has failed to remove the supporting structure for the billboard signs as required by this court's order of October 19, 1981, and several previous court orders, and the court having considered the arguments of counsel, and for good cause show;

It is on this 22nd. day of October, 1981, ORDERED as follows:

1. That the defendant, Wesley K. Bell, or his attorney, produce before this Court on Wednesday, October 21, 1981, before 4:00p.m., a written affidavit based on personal knowledge or testimony before this court as to

why said Wesley K. Bell did not remove the supporting billboard structures in accordance with the orders of this Court, dated October 19, 1981 and July 22, 1981.

2. That the defendant, Wesley K. Bell, shall remove said supporting billboard structures on or before 9:00a.m., on Friday, October 23, 1981. In the event that said billboard supporting structures are not removed in accordance with this order, said Wesley K. Bell shall appear before this court on Friday, October 23, 1981, at 9:00a.m. to explain to the court why said billboard supporting structures have not been removed.

3. That this court continues the $50.00 per day fine it imposed against the defendant by order dated September 24, 1981, until said billboard

supporting structures are dismantled and removed from their present location.

4. This Court will entertain the application for an award of attorney's fees to the plaintiff due to the continued violation of this court's orders which have necessitated repeated court appearances by counsel for the plaintiff.

HENRY H. WILEY/s/

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO. L-32143-81EPW

Plaintiff,

WESLEY K. BELL, t/a/ WES

OUTDOOR ADV. COMPANY

VS.

Defendant,

TWP. OF EAGLESWOOD, et als

CIVIL ACTION

ORDER

FILED: 7/2/82

HENRY H.WILEY,J.S.C.

This matter being opened to the Court on the return date of the Order to Show Cause brought by the plaintiff Wesley K. Bell, in the presence of Lawrence Silver, Esq., attorney for plaintiff

andGilmore & Monahan, attorneys for the defendant, Eagleswood Township, George R. Gilmore, Esq.,appearing, and this matter having previously been transferred to the Chancery Division and the Court having considered the Briefs and Affidavits submitted in the within matter as well as the arguments of counsel and for good cause shown;

It is on this 2nd. day of July, 1982, ORDERED as follows:

That the relief sought in plaintiff's Order to Show Cause that certain sections of the Zoning Ordinance of the Township of Eagleswood, be declared invalid and further to require the issuance of building permits to the plaintiff for the construction of two billboard signs is hereby denied; subject to and until a decision has been rendered in the matter of the

Township of Eagleswood v. Wesley K. Bell, Docket #A 428-81 T2

HENRY H. WILEY,J.S.C./s/

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-428-81T2

TOWNSHIP OF EAGLEWOOD,

Plaintiff-Respondent

v.

WESLEY K. BELL,

Defendant-Appellant

FILED: 7/25/83

ELIZABETH MC LAUGHLIN

Clerk

Argued 6/7/83 Decided 7/25/83

Before Judges Matthews, Antell & Francis.

On Appeal from Superior Court, Chancery Div.Ocean County

Lawrence Silver argued the cause for appellant(Mr.Silver,on brief)

George R.Gilmore argued the cause for respondent(Gilmore & Monahan,attys; Russell P. Cherkos, on brief)

PER CURIAM

The municipal plaintiff proceeded in the Chancery Division for an injunctive order which required the defendant Wesley K. Bell(BELL) to remove two commercial billboard signs erected on a premises within the Township. The order further provided that Bell could erect on the property a temporary political sign not to exceed 32 square feet in overall dimension. Bell appeals the prohibitive aspects of the injunctive order.

The two billboard signs are nonconforming uses contrary to a zoning ordinance passed in 1975. Had the signs remained in their same location it is conceded by the Township that it could not have sought their removal. Both of the billboards were, however, moved from their original locations to

different ones on the premises upon which Bell had an easement.

One of the signs was moved as a result of a Chancery action in which it was determined that it was located on land not owned or leased by Bell. He was ordered in that action to remove the offending sign from the owner's property. At about the same time he moved the other sign from one location to another on the same premises.

The Chancery Division found that the relocation of the signs violated Article 6, Section 103-39B of the Eagleswood zoning ordinance which states:

> No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter.

We agree with the trial judge that the relocation of the signs violated the above provision.

Bell argues that the particular provision is invalid. He contends that the relocation prohibition is an illegal attempt to limit or restrict valid nonconforming uses contrary to statutory authority. N.J.S.A. 40:55D-68. Specifically, Bell challenges as an impermissible restriction on nonconforming uses, the particular subsection quoted above.

In Belleville v. Parrillo's,Inc.,83 N.J. 309(1980),the Supreme Court noted that while the Municipal Land Use Act, N.J.S.A. 40:55D-1 et seq., deems that nonconforming uses have "acquired a vested right to continue in such form, irrespective of...restrictive zoning provisions...[that] statutory guarantee

against compulsory termination...is not wihout limit." Id. at 315. The Belleville court then noted several types of limitations that the courts of this State have allowed municipalities to impose on nonconforming uses. The limitations that have been allowed include: limits on change of use; the enlargement or extension of the repair or replacement of nonconforming structures, and limits on the duration of nonconforming uses through abandonment or discontinuance. Ibid. The Belleville court further noted that the method typically used to limit nonconforming uses was to prevent increase or change in the nonconformity. Id. at 316. The standard set out in Belleville for determining whether a particular nonconforming use would be allowed to

continue where an increase or change in use was contemplated or undertaken was that: "...nonconforming uses may not be enlarged as of right except where the change is so neglibible or insubstantial that it does not warrent judicial or administrative interference." Ibid.

Applying the Belleville standard, the inquiry here is whether the change made by Bell's relocation of the two signs was so negligible or insubstantial as to permit their continuing existance as a valid nonconforming structure. There is no question that the change in location of the two billboards amounted to over 50 feet in one instance and over 100 feet in the other. We conclude that such a relocation is not so negligible or insubstantial a change as to permit their continuance on the

premises.

Bell cites two Pennsylvania cases as authority for his contention that the mere relocation of the signs should not invalidate their nonconforming status. In those cases the moves were found to be insubstantial or negligible. The substantial distance here from the original locations warrented administrative interference by the plaintiff municipality. In any event, "where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the enlargement or change". Belleville, 83 N.J. at 316.

The defendant also challenges Section 103-8H of the zoning ordinance as being unconstitutional as an impermissible

infringement on the First Amendment right of freedom of speech. We doubt the standing of the defendant Bell to raise this issue. Bell was allowed by the municipality, and indeed it is reflected in the judge's order, to construct a temporary sign bearing a political message as long as it did not exceed 32 square feet in total sign area. It appears that Bell had begun the construction of such a sign on the property. This limitation on square footage was imposed since that is the largest dimensioned sign that is allowable by the section in the zoning ordinance which permits signs. Size limitations, absent an arbitrary determination, are allowable. State v. Miller, 83 N.J. 402, 416 (1980). The limitation here is reasonable.

Affirmed.

SUPREME COURT OF NEW JERSEY

ORDER DENYING CERTIFICATION

C-169 SEPTEMBER TERM 1983

21,678

TWP. OF EAGLESWOOD PETITION

Plaintiff,Respondent

FOR

VS.

CERTIFICATION

WESLEY K. BELL,

Defendant-Petitioner

To the Appellate Division,

Superior Court:

A petition for certification of the judgment in A-428-81T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N.

Wilentz, Chief Justice, at Trenton,
this 24th., day of October, 1983.

STEPHEN W. TOWNSEND,/s/
Clerk

Filed: 10/15/83 Supreme Court

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

DOCKET NO. C-4054-80

TWP. OF EAGLESWOOD CIVIL ACTION

a municipal corp. of

the State of N.J. DEFENDANT

Plaintiff

BRIEF

vs.

WESLEY K. BELL,

Defendant.

Wesley K. Bell, Pro Se

188 Route #72, P.O.Box 538

Manahawkin, New Jerssey 08050

609-597-3222

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

STATEMENT OF THE CASE

A. 1. Defendant has leased lot 21 of block 29, which is a tract of land for billboard use since October 7th., 1960 and entered into a subsequent lease dated April 10th., 1963, which was recorded in Book 2315, page 293, on July 16th.,1963.

2. In or about the year 1975, this defendant purchased a deeded interest in lot 21, block 29, said deed recorded in Book 3453 and Page 120.

3. In or about the year 1977, defendant and his wife sold their interest in lot 21, block 29, in exchange for a permanent easement on the North and South ends of the tract, fronting on Route U.S.9, said easements are recorded of record in Book 3664, page 723, in the Ocean County Clerk's office. These easements covered the

location where the billboards were believed to be located.

4. In or about the year 1979, a purchaser obtained the tract just south of lot 21, block 29 and caused it to be surveyed.

5. Said survey resulted in the finding that this defendant had located the original tract improperly and one billboard was located 110 feet south of the boundary line, while the other billboard was midway, in the originally leased tract and not located on the easement area.

6. The adjacent owner filed suit and obtained a judgment that this defendant had to remove his billboard from his lands.

7. This defendant, at the time the suit was filed, had the land surveyed and monuments placed on the permanent

easement areas.

8. In March, 1981, this defendant began re-locating his two billboards within his deeded easements.

9. The Zoning Officer of Eagleswood Township requested the defendant, on April 2, 1981, to fill out a Zoning Permit Application and assisted the defendant in doing so, in the presence of Stephen Newenhouse, and also stated, in his presence, that the defendant could continue with the re-location work and if a variance would be necessary, there should be no problem. The Zoning Officer had also stated that Mayor Hendrickson ordered him to serve the defendant with a notice of violation.

10. Said signs were reconstructed in their exact size and all bolts and materials were re-used with the

exception of some pole replacement.

11. The additional third sign is being constructed for use as an election advertisement, for the defendants upcoming Senatorial election in November,1981.

B. THE ENFORCEMENT AT ISSUE:

An issue before this Court is the Plaintiff's unequal application and enforcement of laws against this defendant as a retaliatory political effort to financially and politicallty damage this defendant-candidate.

ARGUMENT

POINT I

DEFENDANTS BILLBOARDS ARE NONCONFORMING AND THEREFORE NOT SUBJECT TO THE ZONING ORDINANCE

In (Scavone v. Totowa, 49 N.J. Super 423) the Court held "Uses protected by nonconforming use provisions of Zoning Statutes are the uses in fact existing on land at the time of adoption of a new Zoning Ordinance, and if a use was in fact, existing at such time, it may continue, insofar as the Zoning Act is concerned, so long as it continues without substantial change or enlargement. R.S. 39:10-19, 40:55-48, N.J.S.A.

The right of an owner to continue to exercise a nonconforming use is a property right, a part of the land

title that can only be extinguished by acts or omissions indicating an intention to abandon it.

In (Borough of Saddle River v. Bobinski, 108 N.J.Super 7) the Court held "It has frequently been stated that abandonment of a nonconforming use depends upon the concurrence of two factors; one, an intention to abandon; and two, some overt act or some failure to act, which carries a sufficient implication "that the owner neither claims nor retains any interest in the subject matter of the abandonment". (Yokley, op cit 16-13 at 273-274)

The Supreme Court of New Jersey held in (United Advertising Corp. v. Borough of Raritan, 11 N.J. page 144) that "provision of municipal zoning ordinance regulating outdoor advertising business which required

removal of nonconforming signs within two years of effective date of the ordinance was invalid for conflicting with statute providing that any nonconforming use or structure existing at the time of the passage of an ordinance might be continued upon the lot or the buildings so occupied and was clearly separable from the balance of the ordinance. R.S. 40:55-48 N.J.S.A.

In(Rothrock v. Zoning Hearing Bd. of Whitehall Township, 319A 2d 432) and (Alden Park Corp. v. Phila.Zoning Bd. 84 Pa.D.&C. 40 (1952))the Courts held that the changing of the location and the replacing of the old sign with a new one and changing the type of construction did not change the nonconforming use (1) that the nonconforming right to maintain a sign

is not limited to the exact kind, style, and location of the old sign and (2) that the changes in the new sign were de minimis and would not justify a refusal to approve such sign."

In (State v. Accera, 36 N.J.Super 421) the Court held that a municipality cannot assume to itself power to interfere through its zoning ordinance, with those uses which receive legislative protection R.S. 40:55-48, N.J.S.A.

The Court also held that a municipal ordinance cannot interfere with purpose of statute authorizing continuance, indefinitely, of any nonconforming use existing at time of passage of an ordinance. R.S. 40:55-48 N.J.S.A.

POINT II

PLAINTIFFS HAVE ALLOWED OTHER COMPETITIVE FIRMS TO RELOCATE AND REPLACE THEIR BILLBOARD ACROSS THE HIGHWAY FROM DEFENDANT.

On page 20, of the (Regents v. Bakke case, no.76-811,dated June 28,1978) the U.S. Supreme Court said: "the guarantees of the Fourteenth Amendment extend to persons. It's language is explicit: "No state shall...deny to any person within its jurisdiction, the equal protection of the laws". It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights".

(Shelley v. Kraemer, supra at 22. Accord, Missouri ex rel.Gaines v.

Canada, supra at 351; McCabe v. Atchison T & S.F.R.R.Co. 235 U.S. 151, 161-162 (1914) the guarantee of equal protection cannot mean one thing when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

The defendant contends that his policy should apply in the current case because he is being discriminated against because he is a candidate for State Senate for the Democratic Party.

New Jersey case law holds that arbitrary enforcement invalidates an ordinance.

POINT III

DEFENDANT IS A CANDIDATE FOR THE DEMOCRATIC PARTY FOR STATE SENATE AND PLAINTIFFS ARE MOTIVATED BY POLITICAL SUPRESSION, AS THEIR MAYOR HENDRICKSON IS RUNNING ON THE OPPOSING REPUBLICAN TICKET FOR STATE ASSEMBLY

Plaintiffs are using this action for the sole purpose of preventing defendant from constructing political signs within the Eagleswood Township boundaries and to cut off the $4,000.00 yearly income now being received on the two billboards located here since 1960.

The Supreme Court of New Jersey held, in (State v. Miller, 83 N.J. 403) "(6) so construed and as conceded before us by the Borough, the ordinance procludes

a residential property owner from communicationg any other than an extremely limited message by the use of stationary signs on his or her property."

In particular, the ordinances restriction on the manner and place of defendants speech, so severe as to amount to an absolute ban on political speech, offend the First Amendment.

In (Farrell v. Twp. of Teaneck, 126 N.J. Super 461) the Court held "that zoning ordinances prohibiting all political signs were unConstitutional".

In the case of (Metromedia v. San Diego, #80-195, decided July 2nd.,1981) the U.S. Supreme Court, by a vote of 6 to 3, struck down as a violation of the free speech guarantees of the First Amendment, an ordinance that prohibited all billboards except advertising signs

on the premises of a commercial establishment.

POINT IV

PLAINTIFFS ORDINANCE REGULATING SIGNS AND BILLBOARDS IS UNCONSTITUTIONAL

The Plaintiffs ordinance does not provide for or permit any political expression sign anywhere within the municipality and therefore is unconstitutional on its face, (Farrell v. Twp. of Teaneck, 126 N.J. Super 461) and (Metromedia v. San Diego, #80-195 decided July 2, 1981).

In (State v. Miller, 83 N.J. 405) the New Jersey Supreme Court found that "limitations on the size of a sign may be imposed if the allowable square footage is not determined in an arbitrary manner; the size limits if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot".

POINT V

SECTION 103-40 (A) CLEARLY PERMITS AND SUPPORTS DEFENDANTS USE OF HIS "NONCONFORMING STRUCTURES" WHILE THE PLAINTIFFS IN THIS CASE, ATTEMPT TO USE SECTION 103-39, CLASSIFIED AS "NONCONFORMING USES OF LAND".

A nonconforming use of land would be classified under 103-43, "Off street loading and unloading space of parking area".

CONCLUSION

1. The Zoning Ordinance of the Township of Eagleswood, relating to signs and billboards, should be declared unConsitutional because it does not provide for any political signs protected under the First Amendment of Political Speech.

2. The Zoning Ordinance of the Township of Eagleswood relating to structures, permits the continuation of defendants billboards in their present location.

OTHER AUTHORITY

R.S. 39:10-19 N.J.S.A.

R.S. 40:55-48 N.J.S.A.

Zoning Ordinance Section 103:39

Zoning Ordinance Section 103-40(A)

Zoning Ordinance Section 103-43

WESLEY K. BELL, PRO SE/s/

7/6/81

INDEX TO APPENDIX

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIV. OCEAN COUNTY

Plaintiff,

TOWNSHIP OF EAGLESWOOD

a municipal corporation of

the State of New Jersey.

vs. CIVIL

ACTION

AFFIDAVIT

Defendant,

WESLEY K. BELL

STATE OF NEW JERSEY)

COUNTY OF OCEAN) SS:

WESLEY K. BELL, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. Because of a judgment obtained by the adjacent property owner, I had to

move the billboard 128 feet north of its previous location to place it on the southern easement area of lot 21, block 29, which is vacant land except for my billboards.

2. Because of a judgment obtained by adjacent property owner, I had to move a billboard 250 feet north of its previous location to place it on the northern easement area of lot 21, block 29.

3. The R.C. Maxwell Company, last year, moved their billboard 328 feet south of its previous location and reversed its direction to face northbound traffic instead of southbound traffic and in doing so, the R.C.Maxwell Company completely rebuilt the entire billboard with all new materials and changed the type of construction from steel to wood

framework. This was done without any opposition or problems in accordance with Zoning Ordinance Section 103-40(A).

4. I applied for a Zoning Permit on April 2nd.,1981 at the request of the Zoning Officer even though I informed him I did not need one.

5. In the event the Court denies this defendant his use of the billboards and easements, they will become worthless and this defendant will suffer great irreputable harm.

WESLEY K. BELL/s/

Sworn to and subscribed before me, this 6th. day of July, 1981.s/Mark J. Arbus, attorney at law

AMENDMENT I

FREEDOM OF RELIGION, SPEECH AND PRESS: PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

SUPREME COURT OF NEW JERSEY

TWP. OF EAGLESWOOD,
Plaintiff

V.

WESLEY K. BELL,
Defendant

NOTICE OF APPEAL

CIVIL ACTION

NOTICE is hereby given that WESLEY K. BELL, Individually and d/b/a WES OUTDOOR ADVERTISING COMPANY, defendant, hereby appeals to the United States Supreme Court, from the final judgment of denial, filed in this matter on October 25th., 1983 and requests a stay of the penalty imposed in this matter by the lower court, under Rules 18, 50 and 51.

Application for said stay is being

made simultaneously with this notice of appeal.

WESLEY K. BELL,/s/

Pro Se

P.O.Box 538

Manahawkin,N.J. 08050

Rec'd: 12/20/83

Supreme Court of New Jersey

DOCKET ENTRIES-N.J. SUPERIOR COURT

CHANCERY DIVISION-OCEAN COUNTY

Docket# C0405480

CNTY 15 OCEAN

C. TP 13 INJUNCTION

PLNTFF EAGLESWOOD TOWNSHIP OF

DFNDNT BELL, WESLEY K.

P.ATTY GILMORE, GEORGE R. PA# 8026

D.ATTY PRO SE DA# 0

FILE DATE:

052281 1 Verified Complint

052281 58 Pltf's show cause 6/9/81

060281 8 Afft.of Svs.

070281 99 Order re:future date of trial

072281 99 Order to comply w/zoning code

091681 58 Show cause for 9/22/81(P)

092481 99 Order finding deft.in violation

092381 14 Appeal

100981	99	Order continuing application
102381	6	Pltf afft in supp of application
102781	36	Judgment
103081	99	Order to produce & rmv. billboard
110681	6	Afft.of George R.Gilmore, Esq.
120381	37	Abstract of Judgment
031082	99	Order for Discovery
041883	90	Writ of Execution
072683	99	Opinion affirming decision

DOCKET ENTRIES-APPELLANT DIVISION

SUPERIOR COURT

A-00428-81 Team 02

EAGLESWOOD,TOWNSHIP OF,

RESPONDENT

V.

WESLEY K. BELL,

APPELLANT

Date of Appeal	810923
Date Transcript rec'd	811105
Date Appellant brief rec'd	820527*
Date Respondent brief rec'd	820723*
Date to Court	830516
Date Argued	830607
Date Final Disposition	830725
Date Docketed	810930

TIME 1000 LOCATION TRENT

1 Substitutions

13 Remarks

Park G. RAM MPA GBF

Affirmed

Atty: Silver, Lawrence

Appl: Bell, Wesley K. PD COUN

Brief 820527 POS 820527 Appendix 820527 POS 820527 810930,

ORAL ARGUMENT REQUESTED 830208

SUBSTITUTION (1) 820118 SCHUMAN & BUTZ 00203917

MOTION: M-00294-81 39 M/FILE NUNC PRO TUNC FILED 810923 ANS TO COURT 811001

DOCKETED 810930 DECISION 811001 PART G RAM 58P JJP GRANTED SCHUMAN/BUTZ

MOTION: M-00335-81 27 M/STAY FILED 810930 ANS 811001 TO COURT 810930

DOCKETED 811002 DECISION 811001 PART G RAM 58P JJP DENIED SCHUMAN 6 BUTZ

MOTION: M-02643-81 50 M/REMAND-TEMPORARY FILED 820311 ANS 820322 TO COURT 820414

DOCKETED 820323 DECISION 820426 PART G RAM DENIED.

MOT.DEFY: NOTED 820311 CORR 99 OTHER

FEE/SCTY: FEE 810923 $20 PAID FINANCE:
TO 810923 FROM 811006
FEE/SCTY: FEE 830812 $5 PAID FINANCE:
TO 830812 FROM 830901
ATTY: HIERING/GILMORE/MONAHAN
RESP. EAGLESWOOD, TWP. OF, PD COUNT
BRIEF 820723 POS APPENDIX 820723
POS 810930
FEE/SCTY:FEE 820723 $5 PAID FINANCE:
TO 820723 FROM 821221
TRANSCRIPT:(9) HEARING 810709 VOL. 1
ORDERED 810918 DUE 811018 4 COPIES
FILED 811105 CRT.
TRANSCRIPT: 9 HEARING 810722 VOL.1
ORDERED 810918 DUE 811018 4 COPIES
FILED 811105 CRT.
OPINION: ASSIGNED 830607 MAJORITY
830720 CONCURRING DISSENTING
AFFIRMED PUB

SUPREME CT: 811009 1 KEEP COPY OF M/L/A

TO SUPREME COURT(SCHUMAN/B)

SUPREME CT: 811014 2 KEEP SUP CT ORDER DENYING MOTION FOR STAY PENDING APPEAL.

SUPREME CT: 830812 3 KEEP NOTICE OF PETITION FOR CERTIFICATION(SILVER,LAWRENCE) (JLT)

SUPREME CT: 831025 4 PURGE SPMCT ORDER DENYING PET FOR CERT.

REMARKS: 810923 1 M-294-81 M/FL N/A NPT:AFFT IN SUPP;PROOF OF SERVICE(SCHUMAN/B)

810930 2 AFFT IN SUPP:CERT OF SERVICE(SCHUMAN/B)

811001 3 LTTR BRF/APPX IN OPPO TO M-335-81; CERT OF SERVICE(HIERING/G/M)

811001 4 M-294-81 O/G/M/FL N/A NPT (RAM)

811020 5 CASE INFORMATION STATEMENT REC'D:(SCHUMAN/B)

811231 6 SCHEDULING ORDER

ISSUED.

820118 7 SUB OF ATTY (LAWRENCE SILVER IN PLACE OF SCHUMAN/BUTZ)

820311 8 AFFT IN SUPP OF M-2643-81;PROOF OF MAILING(SILVER,L)

820322 9 AFFT IN OPPOSITION TO M-2643-81 (HIERING/G/M)

820527 13 HEARING DATES OF 810709,810722,ARE IN APPL APPNX(LAWRENCE SILVER) CR

820726 10 ORD SUPPRESSING BRF OF RESP TWP OF EAGLESWOOD(RAM)

821115 11 COURTS ORDER VACATING SUPPRESSION ORDER OF 820726 FOR RESP.TWP OF

821115 12 EAGLESWOOD, ETC (RAM)DAR.

DOCKET ENTRIES

SUPREME COURT OF NEW JERSEY

Docket #21,678 Cert #C-169-83

Township of Eagleswood P-R

Gilmore & Monahan, Esqs.

v.

Wesley K. Bell D-P

Lawrence Silver, Esq.

App Div Docket #A-428-81T2

App Div Decision date 7/25/83

F8/12/83 Notice of Petition(+Afft)

8/22/83 Pet for Cert & Appendix (+Afft)

8/22/83 App Div Briefs

8/22/83 $250 Security Deposit

9/6/83 Resp Brief(+Afft)

9/6/83 App Div. Briefs & Appx.

9/7/83 Proof of Service-Gilmore,Esq.

10/25/83 Order denying cert.

12/20/83 Notice of Appeal to
U.S.Supreme Ct.- Bell

12/20/83 Motion for Stay pending Appeal
to U.S.Supreme Ct.-Bell

12/30/83 Brief in opposition to motion
for stay-Gilmore,Esq.

NO. 83-1320

In the

Supreme Court of the United States

October Term

WESLEY K. BELL Defendant Appellant

vs.

TOWNSHIP OF EAGLESWOOD Plaintiff Appellee

On Appeal from the Supreme Court of NEW JERSEY

MOTION TO DISMISS OR AFFIRM

George R. Gilmore, Esquire
Gilmore & Monahan, P.A.
Nine Allen Street
Post Office Box 1540
Toms River, New Jersey 08753
(201) 240-6000

Attorneys for Appellee

May 3, 1984

QUESTIONS PRESENTED

Appellee, Township of Eagleswood, disputes the statement of Questions Presented by Appellant, Wesley K. Bell. None of the questions set forth at Pages i and ii of appellant's brief are properly before the court.

Question 1a, Page i of appellant's brief, was not raised in the trial court, see Transcript at Appellant's Appendix, Page 6a through 75a, and Appellant's Trial Brief, at Appellant's Appendix, Page 131a. Neither were these issues raised before the Superior Court of New Jersey, Appellate Division, see Appellee's Appendix, at page 3a, and Opinion of the Superior Court of New Jersey, Appellate Division, at Appellant's Appendix, Page 121a. See also, Appellant's Petition for Certification to the New Jersey Supreme Court, at Appellee's Appendix, Page 27a.

Questions (c), (d), (e & f), or (g) were not raised before the Superior Court of New Jersey, Appellate Division, or the New Jersey Supreme Court, Appellee's Appendix, Page 3a, and Appellee's Appendix, Page 28a.

Only Question (b) of the statement of questions presented by Appellant has ever been presented to a New Jersey Appellate Court. This question, as presented to the New Jersey Appellate Division (hereafter appellate division) addressed the constitutionality of the Eagleswood Township zoning ordinance in light of the absence of a provision for political signs. As indicated at Appellee's Appendix at Page 21a, the Brief of Wesley K. Bell, before the Appellate Division, raised this issue at Point 3. Appellant argued before that court that the sign ordinance covering R-2 Zone was unconstitutional due to its lack of provision for political advertisement. This question was answered by the Superior Court of New Jersey, Appellate Division, in its affirmance of the trial courts' decision upholding the ordinance, see Appellant's Appendix at Page 121a. The Appellate Division,

in affirming the decision of the trial court, did address this constitutional argument. The New Jersey Court stated:

> "The Defendant also challenges Section 103-8H of the Zoning Ordinance as being unconstitutional as an impermissible infringement upon the First Amendment right of freedom of speech. We doubt the standing of Defendant Bell to raise this issue. Bell was allowed by the Municipality, and indeed it is reflected in the Judge's Order, to construct a temporary sign bearing a political message, as long as it did not exceed 32 square feet in total sign area. It appears that Bell had begun the construction of such a sign on the property. This limitation on square footage was imposed since that is the largest dimensioned sign that is allowable by the section in the Zoning Ordinance which permits signs. Size, limitations, absent an arbitrary determination, are allowable. *State v. Miller*, 83 N. J. 402, 416 (1980). The limitation here is reasonable." Appellant's Appendix, Page 127a, 128a.

Thus, the Superior Court, Appellate Division, determined that although the Eagleswood Township zoning ordinance contains no provision for political signs the ordinance was not unconstitutional. In the alternative, the Court determined that Defendant Bell had no standing to raise the issue since he had not alleged that he sought to erect a political sign larger than 32 square feet. Indeed, it appears from the transcript of the hearing before the trial court that Defendant Bell was contemplating erecting several political signs, each individually not exceeding a 32-square-foot limitation. Whether or not this was done does not appear of record, see Appellant's Appendix at Page 57a through 60a.

For the reasons which follow, it is respectfully submitted that this court should not address the constitutionality of the Eagleswood Ordinance.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE

Appelle, Township of Eagleswood, most strenuously objects to the unsupported statements contained in the Statement of the Case furnished to this court by the appellant. Many of the same are absolutely unsupported by testimony or in affidavit, and none have been presented to any Appellate Court prior to the date they appeared in Mr. Bell's jurisdictional statement. They do not belong in the Statement of the Case presented to this court as they are not in any way relevant to the questions sought to be presented. This being the case, they will not be responded to by the municipality

This matter involves an interpretation of the zoning ordinance of the municipality of Eagleswood Township, located in Ocean County, New Jersey. From approximately 1960, Mr. Bell had maintained two billboard signs on a parcel of property in the township, see Appellee's Appendix at page 8a. In 1975, Mr. Bell purchased the property known as Lot 21, Block 29 on the Tax Map of the Township, Appellee's Appendix, Page 8a. In 1977, the Plaintiff conveyed this parcel to some third parties. He received from these purchasers the right to maintain two easements at the corner of the property where he believed the billboards were located.

Subsequent litigation between Mr. Bell and an adjacent property owner revealed that the billboard signs were not on the points where the easements had been retained. One of the billboard signs was located on an adjacent parcel, and one of the billboards was located on the approximate center of the parcel conveyed by Mr. Bell. The easements stood on the corners of the property conveyed by Mr. Bell some distance away from the signs, Appellee's Appendix, Page 30a. In 1975, the Township of Eagleswood adopted a zoning ordinance prohibiting billboard signs in the zone in which

this property was located. Under New Jersey law, the billboards of Mr. Bell constituted nonconforming uses and the municipality has conceded on numerous occasions that had they remained at their original locations, no action could have been taken to compel their removal, see Appellant's Appendix at Page 13a.

In 1981, Mr. Bell began to relocate the two signs and to erect a third sign which he alleged was to be a political sign. Subsequent to undertaking this action, he made application to the township zoning officer for permission to move the signs. His application was denied, Appellee's Appendix at Page 45a. In spite of this denial, Mr. Bell refused to remove his signs and continued to erect the third sign. No application whatsoever was made for the third sign, Appellee's Appendix at Page 45a. Additionally, although Bell had the obligation of appealing the determination of the zoning officer to the Eagleswood township zoning Board of Adjustment, he never took such an appeal but proceeded in the face of the denial, see Appellant's Appendix at Page 12a.

The Township of Eagleswood filed a complaint in the Chancery Division of the Superior Court of New Jersey, seeking injunctive relief by way of an order of that court compelling the removal of the signs as being in violation of the township zoning ordinance, Appellee's Appendix at Page 44a. On July 9, 1981, the matter came on for hearing before the Honorable Henry H. Wiley, J. S. C., Superior Court of New Jersey, Chancery Division, Ocean County, Appellant's Appendix at Page 6a. That hearing resulted in the order entered by Judge Wiley on July 22, 1981, Appellant's Appendix at Page 95a. The order directed Mr. Bell to remove the billboard signs within 20 days and permitted the Defendant to utilize the existing poles for temporary political advertisements not exceeding 32 square feet.

Appellant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. The New Jersey Appellate Court affirmed and entered the Order found at Appellant's Appendix, Page 121a. Mr. Bell's application to the New Jersey Supreme Court by way of petition for certification was denied, Appellant's Appendix at Page 129a.

Mr. Bell also sought from the Superior Court of New Jersey, Chancery Division, Superior Court of New Jersey, Appellate Division, and the New Jersey Supreme Court, stays of the judgement entered below. Both lower state courts denied the applications for stays of the judgement. The New Jersey Supreme Court has not yet acted on Mr. Bell's motion for stay pending the appeal to this Court. Mr. Bell argued before the Superior Court of New Jersey, Appellate Division, that the movement of the signs was so inconsequential, as to not warrant judicial or administrative interference. This argument was essentially based upon the interpretation of a statutory provision permitting municipalities within the State of New Jersey to limit or restrict uses of land which existed prior to the adoption of a zoning ordinance, and which were prohibited by newly-adopted zoning ordinances. Mr. Bell also argued that the Eagleswood Township zoning ordinance was unconstitutional in that it did not contain a provision for political signs. Mr. Bell also argued that the adoption of the nonconforming use section of the Eagleswood Township zoning ordinance was in excess of the authority granted to Eagleswood Township by State Statute. Only the first and third of these arguments were presented to the New Jersey Supreme Court. No claim was ever presented to an Appellate Court in this State that the actions taken against Mr. Bell were politically motivated, that the actions were the result of a personal dispute between Mr. Bell and the Mayor of Eagleswood Township, or that any improper actions on the part of any public officials

occurred with respect to this matter. The untrue, irrelevant, and improper statements contained in Mr. Bell's statement of the case should be ignored and disregarded by this Court.

On approximately August 12, 1983, Mr. Bell filed a Petition for Certification to the New Jersey Supreme Court, Appellee's Appendix at Page 27a. This petition presented to the highest court of New Jersey the alleged errors committed by the Appellate Division. It contained two points of legal argument and it is important to note that it did not contain arguments concerning the alleged unconstitutionality of the township zoning ordinance for failure to provide for political advertisement.

LEGAL ARGUMENT

POINT 1

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT PROPERLY RAISED AND NOT EXPRESSLY PASSED UPON BY THE COURT BELOW.

As the Court will note from the petition for certification appearing at Appellee's Appendix, Page 27a, the constitutional question dealing with the lack of a provision for political advertisement in the Eagleswood Township Zoning Ordinance was not argued or briefed before the New Jersey Supreme Court. Although the New Jersey Court Rules provide that once certification is granted, the Petitioner's entire case shall be before the Court, only those issues presented in the petition for certification could be considered issues raised on appeal. Indeed, prior to the Amendment of the New Jersey Court Rules, only those matters specifically mentioned in the petition for certification would be considered, see *State v. LeFante*, 14 N. J. 584 (1954).

Since the Appellant elected not to pursue this issue to the New Jersey Supreme Court, it has not been presented to nor passed upon by the court of a last resort of this State. As such, this Court does not have jurisdiction over the matter, see *Street v. New York*, 394 U. S. 576, 89 S. Ct. 1359, 22 L. Ed. 2d. 572 (1969). See also, *Barlemeyer v. State of Iowa*, 85 U. S. 129, 18 Wall. 129, 21 L. Ed. 929 (1873).

This court has set forth the proposition many times that only questions passed upon by the highest State Court will be undertaken for review. As set forth in *Youakin v. Miller*, 425 U. S. 231, 96 S. Ct. 1399, 47 L. Ed. 2d. 701 (1976):

"It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed." 425 U. S. at 235, 96 S. Ct. at 1401, Citing *Duignan v. United States* 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996, 1000 (1927).

Since the New Jersey Supreme Court has not had an opportunity to pass upon the matter, this Court should dismiss the appeal for lack of jurisdiction. See also *City of East Lake v. Forest City Enterprises, Inc.* 426 U. S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d. 132 (1976) at 426 U. S. 672 (Footnote 2) 96 S. Ct. 2361.

POINT II

AN ADEQUATE STATE GROUND EXISTED FOR THE DETERMINATION BELOW, AND THIS COURT SHOULD, THEREFORE, DECLINE TO ENTERTAIN THIS APPEAL.

The New Jersey Supreme Court denied Appellant Bell's petition for certification to the Superior Court of New Jersey, Appellate Division. The denial of the petition for certification constitutes a refusal to review the determination of the Appellate Division. Since Mr. Bell's constitutional argument with respect to the problem of political advertising was not raised in this petition for certification, it is unclear whether or not the New Jersey Supreme Court considered that aspect of the case when declining to undertake a review. Since only two grounds for appeal were contained in Mr. Bell's petition for certification, and since these were both state questions, there is an adequate state ground to support the determination of the New Jersey Supreme Court.

The highest New Jersey Court may well have considered that Petitioner was pressing only the two state grounds for appeal. Since the Federal ground was not contained in the petition for certification, the New Jersey Court may well have interpreted the failure to present this argument as a waiver. Thus, since the New Jersey Court was not presented with the sole constitutional argument, ambiguity exists as to whether or not it was decided. The burden is on the Appellant to demonstrate to this court the existence of a substantial Federal question, see *Department of Mental Hygiene of Cal. v. Kirchner*, 380 U. S. 194, 85 S. Ct. 871, 13 L. Ed. 2d. 753 (1965). Since the New Jersey Court may well have decided, procedurally, that it was not presented with a Federal question, it could dispose of that issue without reaching the merits. A disposition on a procedural basis may constitute an adequate state ground, see *Henry v. State of*

Mississippi 379 U. S. 443, 85 S. Ct. 564, 13L. Ed. 2d. 408, Rehearing Denied, 380 U. S. 926, 85 S. Ct. 876, 13 L. Ed. 2d. 813, on Remand, 174 So. 2d. 348, 253 Miss. 263, Motion Denied, 381 U. S. 908, 85 S. Ct. 1528, 14 L. Ed. 2d. 431. See also *Jackson v. State of New Jersey* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d. 882, Rehearing Denied, 385 U. S. 890, 87 S. Ct. 12, 17 L. Ed. 2d. 121.

Since an adequate state ground existed for the determination of this matter by the New Jersey Supreme Court, this court should decline to entertain the appeal. The highest court of a state should be given an opportunity to review and to construe a statute, or as in this case, an ordinance, prior to a decision on its constitutionality, see *Michigan v. Tyler*, 436 U. S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d. 486 (1978). Thus, where an issue exists as to the extent of the alleged constitutional infirmity, the infirmity may be cured by a state court interpretation and need not be passed upon by this court. It is respectfully submitted that no constitutional infirmity exists in the Ordinance as applied to this Defendant. It is further submitted that since no opportunity for review has been granted to the New Jersey Supreme Court, due to the failure of Appellant to present the issue to that court, it should not be passed upon now.

POINT III

THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS TO NOT REQUIRE FURTHER ARGUMENT.

The sole question presented to this court, which in any way involves a constitutional issue, is so insubstantial that it does not justify the expenditure of this court's time. The Eagleswood Township Zoning Ordinance contains no provision for political advertisement, Appellant's Appendix at Page 1a through 5a. This ordinance, adopted by the governing body of the municipality, is certainly subject to interpretation by that body. Enforcement of it is left to the Township Committee by State Statute. Section 9 of the New Jersey Municipal Land Use Act provides, in pertinent part, as follows:

"The governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder. To that end, the governing body may require the issuance of specified permits, certificates or authorizations as a condition precedent to (1) the erection, construction, alteration, repair, remodeling, conversion, removal or destruction of any building or structure, (2) the use or occupancy of any building, structure or land, and (3) the subdivision or resubdivision of any land; and shall establish an administrative officer and offices for the purpose of issuing such permits, certificates or authorizations; and may condition the issuance of such permits, certificates and authorizations upon the submission of such data, materials, plans, plats and information as is authorized hereunder and upon the express approval of the appropriate State, county or municipal agencies; and may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and

authorizations. In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises." N. J. S. A. 40:55D-18.

The governing body therefore had the authority to enforce the provisions of its ordinance. Eagleswood Township stated at trial, on the record, that it would not take action against the construction of a political sign not exceeding 32 square feet, Appellant's Appendix at Pages 20a, 21a. The order of the trial court specifically permitted the construction of a 32-square-foot political sign, Appellant's Appendix at Page 96a.

In light of this interpretation, it is difficult to see how Mr. Bell has standing to raise the issue. Assuming arguendo that he does, the 32-foot limitation here is reasonable.

In *Baldwin v. Redwood City*, 540 F. 2d. 1360 (9th Cir. 1976), *cert.* den., *sub nom, Leipzig v. Baldwin*, 431 U. S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d. 223 (1977), a 16-square-foot limitation was found proper. In *Ross v. Goshi* 351 F. Supp. 949 (D. Haw. 1972) an 18-foot size limitation was found to withstand constitutional attack. Thus political speech may be regulated as to time, place and manner. Given the determinations of the *Baldwin* and *Ross* courts, and the relative limitations considered by those courts when

compared to the 32-square-foot limit here, the question presented is insubstantial and the determinations below should be summarily affirmed.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the Appellant's appeal should be dismissed or in the alternative, summarily affirmed.

Respectfully submitted,

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APPENDICES

Appellee, Township of Eagleswood, has attempted to faithfully reproduce the items contained in this appendix. No attempt has been made to correct misspellings, typographical or citation errors committed by appellant or his counsel in the Appellate brief or Petition for Certification contained herein.

In addition, no adjustment of the appellant's tables of contents or citations in the aforementioned documents has been made to reflect new page numbers.

The items omitted from the appendix to Appellant's Appellate brief are either set forth in his Jurisdictional statement, or referred to therein. Appropriate references have been provided.

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. C-4054-80
APPEAL NO. A-00428-81-TO2

	CIVIL ACTION On Appeal from
Township of Eagleswood plaintiff-respondent,	Superior Court of New Jersey Ocean County-Chancery Division
v.	
Wesley K. Bell, defendant-appellant	SAT BELOW The Honorable Henry H. Wiley, J.S.C.

BRIEF AND APPENDIX
for
DEFENDANT-APPELLANT, WESLEY K. BELL

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TABLE OF CONTENTS

TABLE OF CASES & STATUTES

REFERENCES TO TRANSCRIPT

T-1, July 9, 1981

T-2, JULY 22, 1981

PROCEDURAL HISTORY

On May 21, 1981, plaintiff filed a Verified Complaint, upon which the Court issued an Order to Show Cause to compel the defendant to remove three (3) billboard signs which were contended to be relocated by defendant on his lot and block, in violation of the Eagleswood Township Zoning Code which prohibited such signs in that particular zone, being R-2. On the return date of the Order to Show Cause, July 9th, 1981, defendant appeared pro se. No Affidavits or answering papers were filed at that time. The Court issued an Order dated July 22, 1981, compelling the defendant to remove his two (2) signs from the premises within twenty (20) days. The Court further found that the sign which would be a temporary political sign, would be allowed if not in excess of 32 square feet in overall dimension.

On September 24th, 1981, the Superior Court entered an Order finding that defendant had violated the previous order of July 22nd, 1981, by failing to remove the two (2) signs detailed in the previous order and imposed a fine in the amount of $50.00 per day from September 21, 1981 until said signs were removed.

Simultaneously with the application for the order referred to of September 22, 1981, defendant moved for a stay of the order compelling the removal of the signs, until the disposition of an appeal which was about to be taken to the Appellate Division of the Superior Court of New Jersey. The Order of September 24th, 1981 denied a stay of the enforcement of the previous order of July 22, 1981. On September 17th, 1981 a notice of motion to file an appeal out of time was filed in the Appellate Division of the Superior Court, by the defendant. The appeal is presently pending.

On September 29th, 1981 defendant made an application to the Superior Court, Appellate Division for a temporary

stay of the inforcement of the order of the Court to remove his signs and for the running of the penalty issued by the Honorable Henry H. Wiley. Said application was denied by order dated October 1, 1981.

Defendant appealed to the Supreme Court of New Jersey for a stay of the orders entered by the Honorable Henry H. Wiley. The Supreme Court of New Jersey refused to grant the stay.

In March of 1982, appellant filed a Motion for Remand to the Superior Court of New Jersey, Chancery Division, which was denied. In February of 1982, appellant filed a complaint in lieu of Prerogative Writ, Superior Court of New Jersey, Law Division, seeking to have the zoning ordinances of the Township of Eagleswood declared unconstitutional.

The purpose of the motion for remand was to permit the Superior Court of New Jersey, Chancery Division, to make complete findings to obviate the need for this appeal.

STATEMENT OF FACTS

On October 7th, 1960, plaintiff executed an advertising lease with the estate of George E.Johnson. (D-A 15). Said lease permitted the construction of out-door advertising signs on the property of the estate, located in the Township of Eagleswood, County of Ocean, State of New Jersey. Pursuant to that lease, two (2) signs were constructed on the premises, later known as lot 21 block 29 as shown on the Tax Map of the Township of Eagleswood, and there is no dispute that on the Township records anyway, said advertising signs were located on that lot. The lease was renewed on April 10th, 1963. (D-A 16). On February 14th, 1975, plaintiff purchased by deed the lands and premises known as lot 21 in block 29, described above. (D-A 17). On May 31st, 1977 plaintiff conveyed the lands and premises to Richard J. Shackleton and Catherine R. Shackleton, his wife (D-A 18), and simultaneously received two (2) easements at each corner of the premises where the two (2) billboard signs were presumed to exist. (D-A 22). In December of 1979, suit was brought against the plaintiff in the Chancery Division, Superior Court, under docket number C 3654-78, claiming that one of the billboard signs was located on the property owned by another. Judgment was entered against the plaintiff to have him remove his signs onto his premises. The lands upon which the one sign was erroneously located, abut defendant's property to the south.

In February of 1975, the Township of Eagleswood enacted a zoning ordinance. The zone in which the billboard signs were located was designated as R-2. Advertising billboard signs were no longer a permitted use, nor a permitted structure. Up to that time, there being no zoning ordinance, the billboard signs were a permitted use. (D-A1).

In the spring of 1981, plaintiff began to move the one sign onto his premises, together with moving a second sign from one part of his premises to another and began to erect a third sign which was a political sign. On April 1, 1981 an application was made to relocate the signs on the premises. On April 3, 1981, said application was denied pursuant to Eagleswood Township Zoning Code, Chapter 103, Section 39, NON CONFORMING USES OF LAND: "No such nonconforming use of land shall be moved in whole or in part to any other portion of a lot or parcel." (D-A 9).

In spite of the denial, the defendant began to erect the sign. The complaint was filed to compel the defendant to remove the sign as he had no permit for the placement of same. The third sign which was the subject of the action below, no permit was applied for. It was merely a sign to announce the candidacy of defendant Bell.

While there is no provision in the zoning code, under prohibited signs, or signs of a political or public interest nature, Judge Wiley held:

> "THE COURT: While I don't think that I have to answer that, Mr. Bell. Actually, there is no sign...political sign that you actually attempted to install, but the municipality has said they will permit you to install a political sign on a temporary basis in a residential zone as long as it is less than 32 square feet. And that's my ruling. I will allow you to do it. I will not prohibit them or restrict them from prohibiting you from doing it."
> July 9th, 1981, p. 36, L. 11-25.

From 1960 through the spring of 1981, defendant had on a continuous basis, with respect to said billboards, advertising of a business nature, political and public interest messages. It is conceded that the billboard structures as they exist, are larger than as permitted by the Zoning Code of Eagleswood Township.

POINT I:

PORTIONS OF SECTION 103-39. NONCONFORMING USES OF LAND., ARE INVALID AS THEY EXCEED THE AUTHORITY GRANTED BY STATUTE, N.J.S.A. 40:55D-68.

The zoning power of a Township was discussed in *Taxpayers Association v. Weymouth Township, 80 N.J. 6, (1976).* At page 20, the Court discussed the power to zone:

> "Zoning is inherently an exercise of the States Police Power. Consequently, municipalities have no power to zone except as delegated to them by the legislature. In this regard, zoning powers are granted to municipalities by the Zoning Enabling Act, N.J.S.A. 40:55-30 et seq., (now 40:55D-62, 40:55D-65, 40:55 D-67)", (case citiations omitted).

Municipalities have no inherent authority to enact zoning ordinances except as derived from State by Statute. *Kursh Holding Co. v. Manasquan, 111 N.J. Super., 359, (App. Div., 1970), Rev. 59 N.J. 241, (on other grounds).* Likewise, a municipality must look to legislation to determine the scope of their zoning powers. *Burger v. State, 71 N.J. 206, (1976).*

It is not contended in this memorandum that the defendant Township, in its zoning ordinance, arbitrarily and capriciously created an R2 Zone at the location of the billboards. It is further accepted that the Township has the right to regulate non-conforming uses and structures. Non-conforming uses and structures are defined in *N.J.S.A. 40:55D, 5,* as follows:

> "*Non-conforming Structure,* means a structure the size, dimension, or location of which was lawful prior to the adoption, revision or amendment of the Zoning Ordinance, but which failed to conform to the requirements

of the Zoning District in which it is located by reason of such adoption, revision or amendment."

"*Non-conforming Use*, means a use of activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which failed to conform to the requirements of the zoning district in which it was located by reason of such adoption, revision or amendment."

This is not a case where the new location of the billboards conflict with the set-back, side-yard or other lot locations of the zoning ordinance, but rather solely that the structure, billboards and the use of out door advertising are prohibited in the zone. *N.J.S.A. 40:55D-68*, deals with non-conforming structures and uses:

"Any nonconforming use or structure existing at the time of a passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." (See predecessor statute N.J.S.A. 40:55-48).

In some jurisdictions, the authorities have deemed it necessary to take legislative steps towards compelling the early abandonment of nonconforming uses and structures. *Grant v. Mayer of Baltimore, 212 Md., 301, (Ct. App., 1957)*. However, in New Jersey there has been no legislative steps and our Courts have continued with the application of the doctrine that nonconforming uses may not be enlarged as of right, except when the enlargement is so negligible or insubstantial that it does not fairly warrant judicial or administrative notice or interference.

Municipalities have forever attempted to circumvent the statutory language relative to nonconforming structures and uses and have repeatedly been unsuccessful.

In *State v. Accera, 36 N.J. Super., 421, (App. Div. 1955)*.

The Borough of Eatontown dealt by ordinances with nonconforming uses as follows:

> "No building or premises which cease to be actively engaged in a nonconforming use for a period of one (1) year, shall be allowed to resume such nonconforming use, but must be altered to conform with the restrictions of the zone in which it is."

At page 423, the Court discussed this ordinance in conjunction with the predecessor nonconforming use statute, RS 40:55-48. (Same as present statute). At 423, the Court held:

> "This statute was enacted obviously with a view to certain conflicting interests. On the one hand, there are municipalities strong interest in a planned community sofaras it may be secured through the média of zoning. Nonconforming uses weaken the plan, and besides, in some cases, confer upon their users vested monoplies in their respective zones. On the other hand, there are the interest of the owner and his nonconforming use and in society in preventing an economical waste; and beyond that, there is societies concern for those who contemplate entering business or making improvements and who seek security against future changes in the zoning plan.
>
> Confronted with these diverse interests, the legislature authorized a continuance, indefinitely of any nonconforming use existing at the passage of an ordinance. A municipal ordinance, of course, cannot interfere with the statutory purposes. As said in *United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 152, 153, (1952);* 'It is beyond the power of a municipality to limit by zoning ordinance the right expressly given the owners (of a nonconforming use) by this statute indefinitely to continue a nonconforming use.' Our inquiry comes down to this; does the statute protect a nonconforming use under some circumstances even

though there has been a censation in the user for a year?"

The Appellate Court found in the case before it, that under some circumstances a nonconforming use may be continued even though it was not exercised for a substantial period of time. At page 425, the Court found that that being the case any attempt by a municipality to foreclose all nonconforming uses under all circumstances of such a break, violates the statute. In *Spiegel v. Borough of Beach Haven, 16 N.J. Super., 148 (App. Div., 1971),* the Borough had an zoning ordinance establishing a percentage of damage beyond which a nonconforming construction may not be replaced or reconstructed. The Court held as follows:

"What constitutes 'partial destruction' must depend upon the facts of each case...we go no further...then to hold that a percentage of delineation by ordinance is not authorized."

It is cited *H. Behlon and Bros. v. Mayor of Kearny, 31 N.J. Super. 30, (App. Div., 1954).* In Behlon, supra., the Town had ordinances permitting restoration where there were percentages built into the ordinance. The ordinance also dealt with what rights of repair a nonconforming user may have to its structure. Accordingly, the ordinance had a dual pronged approach. Structures could only be restored if it had a certain percentage of the structure remaining and could only be repaired if the repairs involved less than a stated percent of the value of the building.

The Court held that the statutes specific treatment of nonconforming uses would prevail over any right or authority which may other wise thought to exist by virtue of the reference to reconstruction, alteration, or repairs in the general provisions of *RS 40:55-31.* It further went onto say:

"With respect to the authorization for reconstruction or structural alterations where there has been no

> destruction, we do not believe that the legislature intended by the quoted statutory provisions to preclude reconstruction or alteration which prudent mangement or safety may require in the ordinary course of events, so long as the nonconforming use itself is not altered or enlarged. ...any other view would be tantamount to a finding that the legislature intended that, except or ordinary repairs, a nonconforming structure must be permitted to become antiquated or to disintegrate in a state of collapse."

Accordingly, the ordinance was invalidated.

The case law has then consistently held that the statute dealing with nonconforming uses and structures provides for their continued use, and that they may not be enlarged or expanded except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference. *Grundlehner v. Dangler, 29 N.J. 256, (1959); Belleville v. Parrillo's Inc., 83 N.J., 309 (1980).* The Court cited numerous cases at page 315-317, standing for the proposition that N.J.S.A. 40:55 D-68, is to be construed by a case basis as to whether or not a nonconforming use has been extended or altered to such an extent as to lose the use.

Turning now to the nonconforming use section of Eagleswood Township zoning code, it is apparent that certain sections dealing with use and structure, which are more properly criteria to decide on a case by case basis (whether a use or structure which is nonconforming has been altered or extended) legislates such nonconforming use and structure out of existence.

103-39 Nonconforming Uses:

There are three parts dealing with nonconforming uses. Turning first to section C. If the nonconforming use has ceased for any reason, for a period of one year or more, then the use is lost. This part is clearly in conflict with *Accera,*

Supra. Section A states that not only may a nonconforming use not be enlarged or increased, but further cannot extend to occupy a greater area of land that was occupied by such use at the effective date of the adoption of this chapter.

Section B states that use shall not be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter. The question to be asked is *whether or not there can be an inconsequential or unsubstantial movement or extension which does not warrant administrative interference*, such as legislated in the ordinance. The case law cited holds that in certain situations there can be. However, under the ordinance, any movement or extension is violative of the nonconforming use.

Accordingly, parts A, B, and C must fall in that it is more properly for the legislature and the legislature by its inaction, has, in accordance with *Parrillo, Supra.*, left the matters to be treated on a case by case basis.

Section 103-41 which treats nonconforming uses of structures, in combination, consists of seven (7) parts. Without listing each part individually, (Ordinance attached hereto as D-A 12), it is clear that this section must also fall.

At T.1, p.32 * the Court began a discussion of its finding of fact in the matter. T.1, P.32.L.8-T.1, P36, L10. At T.1, P.33, L11, the Court discussed specifically the attempted relocation by Mr. Bell of his signs. It stated as follows:

"The zoning provision Article Six refers to nonconforming use and Section 103.39 B reads and I'll quote: 'No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter.'

And here there was an attempt to relocate the sign

T.1. p. indicates transcript July 9th, 1981

without first getting the municipal approval. And I find that that is in violation of the municipal ordinance, and therefore, I will order that the two signs which are presently relocated and which have commercial information on them,. one is an advertisement, Holly Lake Park, that's how I'll identify that sign. That should be removed. And the other one has the information on it, Tradewinds Furniture; but again, that's a commercial sign. It's been relocated and it's in a residential zone without obtaining first the permission of the proper municipal officers."

At T.1, P.26, L.13, Mr. Bell raised the issue that the nonconforming use has not undergone a substantial change or enlargement and should be entitled to continue even though relocated onto the premises. It was not contended by the plaintiff, that the signs were of a different character or size as those which were continuously on the premises, nor that said signs would take up more area than they previously did. However, in his findings of fact and conclusions of law, the Court did not address itself to that issue. It merely stated the literal language of the ordinance and found that any movement of the signs without prior approval would be in violation of same.

Accordingly, based on the survey presented herein of the various sections of the Eagleswood Township Ordinance as it relates to nonconforming uses and structures, defendant requests that said ordinance is to be declared invalid.

POINT II.

IT IS CLEAR THAT PLAINTIFF'S DESIRE TO PLACE HIS SIGNS IN CONFORMANCE WITH HIS EASEMENT IS SO INSUBSTANTIAL AND INCONSEQUENTIAL AS NOT TO WARRANT ADMINISTRATIVE INTERFERENCE AND THAT THE SAME IS AUTHORIZED BY N.J.S.A. 40:55D-68.

The areas in which plaintiff's signs have existed since 1960 has not changed in its character. It is comprised mostly of woodlands and bounded by commercial buildings in the nearby area. There is no residential housing in the area, nor has there been any for at least twenty (20) years. The replacement of plaintiff's billboards shall be the same size, composition and square area. It is interesting to note the case law cited by *Parrillo, Supra.*, which sets forth the standards for whether a substantial change in use has occurred. At page 314, the Supreme Court held:

> "The focus in cases such as this must be on the quality, character, and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and zoning plan."

While the zoning plan may be R-2, the neighborhod as it exists will be little affected by the movement of the signs. It is clear in this matter, however, that the use has not changed nor has it been enlarged. Additionally, the property which is the subject of this action, borders the commercial zone. It is only the position of the structure which has changed. In *Kramer v. Town of Montclair, 33 N.J. Super., 16 (App. Div. 1954).* Kramer had a nonconforming right to use his premises for the parking of one and half ton trucks. Under said right as many as sixty (60) trucks had been parked on the premises, each truck being one & ½ tons, 22 feet in

length and 7½ feet in height. At the time of the litigation, he had only 15 trucks or fewer on the premises, but each were 6 tons, 40 feet in length and 9 feet high. The Court held that irrespective of the change in the type of trucks, there was no increase in either total tonage nor in the total length of the trucks stored, or so far as it appeared, in the total area devoted to parking. The Court held that what affect if any said increase would be, it did not have to say. At page 17, the Court held;

"So far as we observed, we see no factor by which to measure any enlargement except that some of the trucks are bigger. But we do not think that this extends the use under the circumstances."

The Court also dealt with whether or not there was a change in the kind of use.

"So far as we can ascertain, the change is insignificant."

It is further fundamental, that there being no change in the size, composition, the square area of the billboard is significant import to support his position, in light of *Kramer, Supra.*

While the New Jersey Courts have not dealt specifically with the issue concerning billboards and their placement and their relocation as affecting a nonconforming use, other Courts have. The Pennsylvania Courts have been faced with similar issues. In *Rothrock v. Zoning Board of Whitehall Township, 319 A 2nd, 432, (Co. Ct., 1974),* an automobile business was operating in an R-2 zone as a nonconforming use. Additionally, it had a sign announcing the business which was also nonconforming. Rothrock placed a new sign similar to its old one on the premises. The only differences were:

A. The new sign had the words, "Datson, Used Cars."

B. The new sign had a new concrete base at a different location. (the location difference was minute).

C. The new sign had two steel poles where the other sign had but one.

Under the ordinance, nonconforming signs could continue and be maintained for a period of seven (7) years. Apparently, the Pennsylvania legislature permits the zoning out of existence of nonconforming uses, a treatment which New Jersey finds repugnant. (See *United Advertising Co. v. Raritan, 11 N.J. 144, (1952).* In spite of same, the Court found that the differences between the old and new signs were de minimis, and held that the same were not an enlargement or extension of a nonconforming use or structure.

It cited for support of its opinion, *Alden Park Corp. v. Philadelphia Zoning Board of Adjustment, Inc., 84 Pa. D & C 40, (1952).* In Alden, a building permit for a new sign to replace the old one was denied because the location was changed by nine (9) feet and the new sign was stainless steel, whereas the old one had been made of wood. The Court held as follows:

> "1. The nonconforming right to maintain a sign is not limited to the exact kinds, style and location of the old sign.
>
> 2. That the changes in the new sign were de minimis and would not justify a refusal to approve a new sign."

Defendant's right to a nonconforming use was somewhat clouded by the Court at T.2 * P.2 beginning at L.2 through L.18. In response to defendant's question as to whether or not the billboards have lost their nonconforming use as a result of their relocation, the Court, at L.10 advised:

> "I don't think it is an issue before or wasn't before me, whether the boards...the billboards in their new location have lost their nonconforming use or they have not...wasn't an issue. The issue was whether you could

*T.2 to indicate transcript July 22, 1981.

relocate them pursuant to the ordinance. So I am not going to make that finding, because it's not...wasn't part of the case."

At T.2, P.3, L.13, the Court stated, in rebuttal to Mr. Bell's assertion that it need decide whether the relocation of the signs were in accordance with his nonconforming use, as follows:

"The Court. Well I disagree. My finding was that the ordinance did not allow you to do what you did here. So I am not making anymore of a finding then that."

It is clear that a building permit was necessary for the relocation of the sign, albeit they were moved within the lot. However, the issue was raised and it was incumbent upon the Court to decide whether or not the ordinance prohibiting the movement of the signs was in conformance with the Municipal Land Use Act, and further, whether or not the movement of the signs was of such a nature as to not render administrative interference. This the Court failed to do.

POINT III

THE SIGN ORDINANCE IN THE R-2 ZONE IS UNCONSTITUTIONAL.

The R-2 zone, permits signs as follows:

H. Permitted Signs:

"(1) Signs advertising the sale, rent or lease of the land or buildings upon which such signs are located. Such signs shall not exceed eight (8) square feet in area, shall be distant from the street line not less than one-half (½) of the front yard depth and shall not be illuminated.

(2) Signs or bulletin boards not exceeding twenty (20) square feet in area, identifying a public building, project, school or similar use. Such as the name of the building or institution and its activity of service. They may be illuminated, but not flashing.

(3) A sign or nameplate, nonilluminated, identifying the owner or occupant of the building or dwelling unit, provided that the surface area does not exceed six (6) square feet on any one (1) side.

(4) signs of a temporary nature that identify an engineering or architectural contractor engaged in the construction of a building, provided that the surface of such signs shall not exceed or total more than thirty-two (32) square feet in area and provided that such signs are removed prior to occupancy of the building."

The Commercial zones carry the following section with respect to permitted signs.

G. Permitted Signs.

"(1) A business or advertising free-standing sign not in excess of thirty-two (32) square feet in surface area per side.

(2) A shopping center shall be permitted two (2) free-

standing business signs each not over thirty-two (32) square feet in the surface area per side. No part of either sign shall be closer than ten (10) feet from a street right-of-way line or ten (10) feet from a side lot line. When only one such identification sign is erected, the total surface area may be increased by fifty percent (50%).

(3) Signs for automobile service stations may provided one (1) free-standing double-faced sign not to exceed thirty-two (32) square feet in surface area per side in addition to one (1) wall sign. Said signs shall not exceed twelve (12) inches in thickness and may advertise only the trade name of the product offered for sale."

The ordinance, while making provisions for commercial billboard signs, fails in all respects to make provision for signs of a political nature or of a public interest nature. In fact, as the sign ordinances are negative covenants, types of signs which are not provided for are in fact prohibited.

It is not contested that the Township has the right to regulate signs within its borders. However, to withstand strict constitutional scrutiny required, the restriction on signs must be tied to a compelling municipal interest as well as to the uses permitted in a given zone, *Shoen v. Hillside, 155 N.J. Super., 290 App. Div. (1975).*

In *Taxpayers Association v. Weymouth Twl., 80 N.J. 6, (1976), appeal dismissed and Cert. Den., Sub. No., Feldmanv. Weymouth, 430 U.S. 977, (1977),* the Supreme Court of New Jersey upheld zoning of a mobile home park exclusively for the elderly.In its opinion, the Court held as follows:

"Ordinance adopted under the zoning enabling act must bear a real and substantial relationship to the regulation of land within the municipality."

In *State v. Miller, 83 N.J. 402, (1980),* Miller had posted a

sign on his property warning prospective purchasers of the hazards of living in the area. The sign was not permitted in a residential zone, nor had it met the ordinance with respect to to the size of the signs. At page 416, the Court held;

> "It should be emphasized, however, that the regulation of sign content must be limited to a general distinction between commercial speech as tied to commercial use permitted in a given zone, and political speech which is and must be permitted everywhere. Specific types of messages or particular messages may not be prohibited... however they may of course be subjected to reasonable restrictions on their time, place and manner."

At page 414, the Court found that ordinances which prohibit against political or public interest speech via signs in a particular district, are unconstitutional on its face. It held:

> "Because the ordinance so directly cuts to the heart of the first Amendment, we decline to perform judicial surgery or to adopt a narrow construction in an effort to save it. The ordinance is unconstitutional on its face."

Plaintiff's billboards, as depicted herein, are not only for the purpose of commercial speech, but have from time to time been utilized to back candidates as well as bring messages of a public interest, other than commercial ones.

In *Metromedia, Inc., et al v. City of San Diego, et al, US (1981),* a billboard company was contesting the constitutionality of the San Diego ordinances prohibiting off-site advertising. Embodied in the ordinance, were stated exceptions to the prohibition on sign advertising. In fact, while the exceptions allow for certain commercial advertising, they do not allow for noncommercial, vis-a-vis political or public interest speech at that same location. Because of the prohibition on one commercial and public interest speech, as opposed to commercial speech, the Court held that the ordinance reached too far into the realm of protected speech

and was unconstitutional on its face.

Such is the matter before this Court. It is clear that the billboard advertising may be regulated within a residential zone, even prohibited. However, provisions have been made for billboard advertising in commercial zones. No such provision has been made in any zone for political or public interest messages.

The fact that the Township abandoned its claim that Mr. Bell did not have the right to construct a political sign in an R-2 zone is of no moment. (T.1, P.30, L.4-16). Within the confines of the ordinance itself, only certain signs are permissible.

To permit the Township, on a case by case basis to decide whether or not to enforce the ordinance as to public message or political signs, would create the confusion that *State v. Miller, Supra.* is sought to alleviate. At T.2, P.4, L.14, in discussing its findings and conclusions of law with respect to whether or not the ordinance itself permitted political billboards up to 32 square feet, the Court held:

"Thirdly, the Order has no findings that the ordinance permits political billboards up to 32 square feet as the Judge stated from the bench, even though the political billboard under construction is 96 square feet. Well I didn't make a finding on that, but the attorney for the Township stated, and I assume he would be bound by his statement, that they, that is the Township, would allow political signs up to 32 square feet. That was what he said. So that's in the record, and you can get the transcript of the record for that information on appeal if you think you need it. But I didn't make any finding like that. And I agree with that and I don't intend to--and the--" (T.2, P.4, L.14-T.2,P.5, L.3).

CONCLUSION

Nonconforming uses and the right to erect political and public message signs are protected by the *Municipal Land Use Act* and the *First Amendment* of the United States Constitution and the *Fourteenth Amendment* as it applies to New Jersey. The Township may not by ordinance supersede the authority granted to it under the Municipal Lane Use Act. The ordiances with respect to the nonconforming uses and structures go beyond the authority granted by statute.

It is equally clear from an analysis of the case law that certain speech of a non-commercial nature is to be protected, irrespective of whether or not the municipality agrees with the type of speech. (the candidacy of Mr. Bell).

It is respectfully requested that the ordinances as they relate to the type of signs permitted in a district, be declared unconstitutional. It is further respectfully requested that the ordinances as they relate to nonconforming uses be declared invalid as they supersede the authority granted by statute. In the event that said ordinances are held by the Court to be within the purview of the municipality by the authority granted by said statute, then it is respectfully requested that the Court find that the relocation of the two (2) billboard signs be found to be neither an enlargement nor an extension of a nonconforming use, but rather so insubstantial as to not warrant administrative interference.

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ITEMS OMITTED FROM APPENDIX OF APPELLANT BELL'S BRIEF IN SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

ITEM	REFERENCE-APPELLANT APPENDIX
1. Eagleswood Township Zoning Ordinance	Pages 1a-5a
2. Transcript of Order to Show Cause	Pages 6a-75a
3. Transcript of Hearing on Form of Order	Pages 76a-88a
4. Deeds/Leases	Page 152a

SUPREME COURT OF NEW JERSEY

NO. A 428-81T2

Term: 1983

TOWNSHIP OF EAGLESWOOD,

Plaintiff respondent

CIVIL ACTION PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION

WESLEY K. BELL,

Defendant-petitioner

Sat Below:

Honorable Robert A. Matthews

Honorable Melvin P. Antell

Honorable George B. Francis

LAWRENCE SILVER, ESQ.
Attorney for defendant petitioner
P.O. Box 549
Barnegat, NJ 08005
698-2050

TABLE OF CONTENTS

TABLE OF CASES & STATUTES

SUPREME COURT OF NEW JERSEY

No. A 428-81T2

Term 1983

Township of Eagleswood,

Plaintiff-respondent,

CIVIL ACTION PETITION
PETITION FOR
CERTIFICATION TO THE
SUPERIOR COURT,
APPELLATE DIVISION

WESLEY K. BELL,
Defendant-petitioner

Sat Below:
Honorable Robert A. Matthews
Honrable Melvin P. Antell
Honorable George B. Francis

To the Honrable Chief Justice and Associate Justices of the Supreme Court of New Jersey,

Defendant-petitioner, Wesley K. Bell of Manahawkin, New Jersey respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

Defendant is in the business of erecting and leasing outdoor advertising space. In 1960 the defendant erected two (2) signs on premises in Eagleswood Township, under lease from the owner. He subsequently pourchased the land from the owner and conveyed it to a third party, reserving for himself two (2) easements for which to carry the signs, in 1978. In 1975 plaintiff enacted a Zoning Code for the first time. Commercial Billboard Signs were not permitted in the zone in which the defendant was located. Approximately one (1) year thereafter, as a result of a Court challenge by an abutting land owner, defendant learned that his signs were not on the easements as provided, but rather one was on the abutting land owners property and another was approximately 50 feet off the easement. Defendant attempted to secure bulding permits from the Township to reconstruct his signs on the easements as so constituted. There is no questions that Eagleswood Township, at all times prior considered the signs as being on the lot in question. The Courts below held that the defendant was not entitled to move his signs to their proper location on the lot as a matter of right. The signs were of exactly the same quality, character, size and composition as the signs were in the previous location.

The Appellate Court, in affirming the decision of the Court below, relied upon *Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980).* However, the Court erred in its analysis of this Court's holding in *Parrillo.* It concluded that movement of signs over 50 feet was not a negligible or insubstantial change as to permit their contuance on the premises. However, the Court only considered the re-location and not the "quality, character, and intensity of the use viewed in their totality and with regard to the overall affect on the

neighborhood and zoning plan." This was the standard of factors to be considered as set forth by the Court at page 314 in *Parrillo*.

The compelling reasons for the Court to grant certification in this matter is that failure to do so would serve to strip Mr. Bell of a valuable property right. His right to utilize the billboard signs in commercial activity would be destroyed on this location.

The Appellate Court further declined to consider in its opinion the ordinances of Eagleswood Township as they relate to nonconforming uses and structuraes as being overly broad and exceeding the authority as granted by *40:55D-68*.

The Lower Court fined Bell $50.00 per day for his failure to remove the signs. There is presently due approximately $2,800.00 in fines, interest and costs. It is respectfully requested that a stay of said fines be granted until this matter is decided.

ARGUMENT

POINT I.

DEFENDANT'S DESIRE TO PLACE HIS SIGNS IN CONFORMANCE WITH HIS EASEMENT IS SO INSUBSTANTIAL & INCONSEQUENTIAL AS NOT TO WARRANT ADMINISTRATIVE INTERFERENCE AND THE SAME IS AUTHORIZED BY N.J.S.A. 40:55D-68.

The standard by whether a substantial change in use has occured has been set by the Supreme Court in *Belleville v. Parrillo, Supra.* The standard is dictated on Page 314 as follows:

> "The focus in such cases, such as this, must be on the quality, character, and intensity of the use, viewed in their totality and with regard to their overall affect on the neighborhood and zoning plan."

The area in which the defendant's signs have existed since 1960 has not changed in its character. It is comprised mostly of woodlands and bounded by commercial buildings in the near by area. There is no residential housing in the area, nor has there been any for at least twenty (20) years. The replacement of the billboard signs is of the same size, composition and square area. The neighborhood as it is exists will not be affected by the movement of the signs. The use has not changed, nor has it been enlarged. The property borders a commercial zone. The sign shall take up no more space on the lot than previously.

The Appellate Court held that "where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the Court had consistently declared that it is to be resolved against the enlargement or change." However, the Appellate Court's interpretation leaves an open-ended invitation to municipalities to put an end to all noncon-

forming uses upon even the most minute change. The opinion seems to indicate that if the change or enlargement is questioned by the municipality then that and that alone give rise to the "doubt" as expressed in the standard set forth in *Parrillo*.

POINT II:

THE ORDINANCE UPON WHICH PLAINTIFF RELIES IS INVALID AS IT EXCEEDS THE AUTHORITY AS GRANTED BY N.J.S.A. 40:55D-68.

The ordinances of Eagleswood Township are set forth in the appendix of the Appellate Court Brief. More particularly, section 103-39b states, "that no nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter." This section does not take into account whether there can be inconsequential or unsubstantial movement or extension which does not warrant administrative interference and which can occur as a matter of right, even in a nonconforming use. However, the same is not considered in the Township Ordinance and as such exceeds the authority as granted by the section of the Municipal Land Act providing for continuation of nonconforming uses.

The Court's have not been reluctant to strike other ordinances which attempt to interfere with *N.J.S.A. 40:55D-68.* In *State v. Accera, 36 N.J. Super., 41 (App. Div. 1955),* a Borough of Eatontown Ordinance which held that any bulding or premise which was not actively engaged in a nonconforming use for a period of one (1) year, shall not be allowed to continue.

In *Spiegel v. Borough of Beach Haven, 116 N.J. Super., 148, (App. Div. 1971),* Beach Haven had an ordinance which established a percentage of damage beyond which a nonconforming construction may be replaced or reconstructed. In each of these instances, the Court found the ordinance to be invalid in that each matter is to be construed on a case by case basis and not by strict interpretation of ordinance. The question of whether the use or structure has

been lost depends upon the facts peculiar to that case and cannot be dealt with in generalities.

CONCLUSION

Wherefore the defendant prays, for the reasons set forth herein, that this Court grant certification.

Dated: August 22, 1983

LAWRENCE SILVER
Counsel for defendant-etitioner

I hereby certify that the foregoing petition presents a substantia qesion meritig cert-ification, and that it is filed in good faith and not for the purpose o delay.

Dated: August 22, 1983

LAWRENCE SILVER
Counsel for defendant-etitioner

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-428-81T2

TOWNSHIP OF EAGLESWOOD,
Plaintiff-Respondent,
v.
WESLEY K. BELL,
Defendant-Appellant.

Argued June 7, 1983 Decided Jul 25, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Superior Court, Chancery Division, Ocean County.

Lawrence Silver argued the cause for appellant Mr. Silver, on the brief).

George R. Gilmore argued the cause for respondent (Gilmore & Monahan, attorneys; Russell P. Cherkos, on the brief).

PER CURIAM

The municipal plaintiff proceeded in the Chancery Division for an injunctive order which required the defendant

Wesley K. Bell (Bell) to remove two commercial billboard signs erected on a premises within the Township. The order further provided that Bell could erect on the property a temporary political sign not to exceed 32 square feet in overall dimension. Bell appeals the prohibitive aspects of the injunctive order.

The two billboard signs are nonconforming uses contrary to a zoning ordinance passed in 1975. Had the signs remained in their same location it is conceded by the Township that it could not have sought their removal. Both of the billboards were, however, moved from their original locations to different ones on the premises upon which Bell had an easement.

One of the signs was moved as a result of a Chancery action in which it was determined that it was located on land not owned or leased by Bell. He was ordered in that action to remove the offending sign from the owner's property. At about the same time he moved the other sign from one location to another on the same premises.

The Chancery Division found that the relocation of the signs violated Article 6, Section 103-39B of the Eagleswood zoning ordinance, which states:

> No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of the adoption of this chapter.

We agree with the trial judge that the relocation of the signs violated the above provision.

Bell argues that the particular provision is invalid. He contends that the relocation prohibition is an illegal attempt to limit or restrict valid nonconforming uses contrary to statutory authority. *N.J.S.A. 40:55D-68.* Specifically, Bell challenges as an impermissible restriction on nonconforming uses the particular subsection quoted above.

In *Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980),* the Supreme Court noted that while the Municipal Land Use Act, *N.J.S.A. 40:55D-1 et seq.*, deems that nonconforming uses have "acquired a vested right to continue in such form, irrespective of...restrictive zoning provisions...[that] statutory guarantee against compulsory termination...is not without limit." *Id.* at 315. The *Belleville* court then noted several types of limitations that the courts of this State have allowed municipalities to impose on nonconforming uses. The limitations that have been allowed include: limits on change of use; the enlargement or extension of the repair or replacement of nonconforming structures, and limits on the duration of nonconforming uses through abandonment or discontinuance. *Ibid.* The *Belleville* court further noted that the method typically used to limit nonconforming uses was to prevent increase or change in the nonconformity. *Id.* at 316. The standard set out in *Belleville* for determining whether a particular nonconforming use would be allowed to continue where an increase or change in use was contemplated or undertaken was that: "...nonconforming uses may not be enlarged as of right except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference." *Ibid.*

Applying the *Belleville* standard, the inquiry here is whether the change made by Bell's relocation of the two signs was so negligible or insubstantial as to permit their existence as a valid nonconforming structure. There is no question that the change in location of the two billboards amounted to over 50 feet in one instance and over 100 feet in the other. We conclude that such a relocation is not so negligible or insubstantial a change as to permit their continuance on the premises.

Bell cites two Pennsylvania cases as authority for his contention that the mere relocation of the signs should not

invalidate their nonconforming status. In those cases the moves were found to be insubstantial or negligible. The substantial distance here from the original locations warranted administrative interference by the plaintiff municipality. In any event, "where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the enlargement or change." *Belleville*, 83 *N.J.* at 316.

The defendant also challenges Section 103-8H of the zoning ordinance as being unconstitutional as an impermissible infringement on the First Amendment right of freedom of speech. We doubt the standing of the defendant Bell to raise this issue. Bell was allowed by the municipality, and indeed it is reflected in the judge's order, to construct a temporary sign bearing a political message as long as it did not exceed 32 square feet in total sign area. It appears that Bell had begun the construction of such a sign on the property. This limitation on square footage was imposed since that is the largest dimensioned sign that is allowable by the section in the zoning ordinance which permits signs. Size limitations, absent an arbitrary determination, are allowable. *State v. Miller 83 N.J. 402, 416 (1980).* The limitation here is reasonable.

Affirmed.

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ATTORNEY FOR defendant

Plaintiff
TOWNSHIP OF EAGLESWOOD,
v.
Defendant
WESLEY K. BELL,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APPEAL NO. A 00428-81-T02
Docket No. C 4054-80

CIVIL ACTION

NOTICE OF PETITION FOR CERTIFICATION

NOTICE is hereby given that the defendant Wesley K. Bell will petition the Supreme Court of New Jerseyu for Certification to the Appellate Division to review the final judgement of the Appellate Division entered in favor of the plaintiff in this action on July 25th, 1983.

The defendant further requests a stay of Civil Penalties, together with interest in the amount of $2,800.00.

The defendant is represented by Lawrence Silver, Esq.,

850 West Bay Avenue, P.O. Box 549, Barnegat, New Jersey, 08005, (609) 698-2050.

Dated: August 11th, 1983

LAWRENCE SILVER
Attorney for defendant

PROOF OF SERVICE

On August 12th, 1983 I, the undersigned, hand delivered to Clerk, Appellate Court, Trenton, New Jersey original and one copy of Notice; to Clerk, of the Supreme Court, Trenton, New Jersey, copy of said notice; to Gilmore and Monahan, P.A., attorneyus for the plaintiff, copy of said notice.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: August 12th, 1983

EDWARD CURLEY

FILED MAY 21, 1981

Henry H. Wiley
Judge
Superior Court

HIERING, GILMORE & MONAHAN
NINE ALLEN STRET
P.O. BOX 1540 TOMS RIVER, NEW JERSEY 08753
(201) 240-6000
ATTORNEYS FOR Plaintiff

Plaintiff
TOWNSHIP OF EAGLESWOOD, a municipal corporation of the State of New Jersey,
vs.
Defendant
WESLEY K. BELL.

SUPERIOR COURT OF
NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY

Docket No. C 4054 80

Civil Action
VERIFIED COMPLAINT

Plaintiff, Township of Eagleswood, a municipal corporation of the State of New Jersey, having its principal office on Main Street, West Creek, New Jersey, by way of complaint against the defendant, says:

1. Plaintiff is a duly-incorporated municipal corporation

of the State of New Jersey.

2. In accordance with the provisions of N.J.S. 40:55D-1 et seq., the Township of Eagleswood adopted a zoning ordinance set forth in the Township Code Book as Chapter 103-1 et seq.

3. On or about April 2, 1981, the defendant made application to the Zoning Officer of the Township of Eagleswood, Herman O. Pharo, for a zoning permit to relocate three billboard signs. A copy of said application is attached hereto and made a part hereof as Exhibit A.

4. The application for a zoning permit by the defendant was denied by the Zoning Officer of the plaintiff, Township of Eagleswood, on the basis that the same was prohibited under Section 103-39 of the Township Code, a copy of which is attached hereto and made a part hereof as Exhibit B.

5. The property on which the defendant sought to relocate the billboard signs is zoned R-2, residential. Section 103-8(H) sets forth the signs which are permitted in the R-2 residential zone.

6. The billboard signs which the defendant sought to relocate are not permitted signs under the provisions of Section 103-8 (H). Although these signs were presently located in the R-2 zone, the same could not be relocated as relocation would be in violation of Section 103-39 (B) of the Township Code.

7. Notwithstanding the denial of the zoning permit, the defendant has relocated and erected two billboard signs and is in the process of relocating and erecting a third billboard sign, all in violation of the provisions of Section 103-39 (B) as the same are nonconforming uses under Section 103-8 (H). A letter dated April 9, 1981 was sent by the attorney for the Eagleswood Township Board of Adjustment to the defendant ordering him to desist from any further activity in relocating said signs. A copy of said letter is attached hereto

as Exhibit C. That letter was ignored.

WHEREFORE, plaintiff seeks judgement:

a. Requiring the defendant to immediately remove said billboard signs.

b. Restraining the defendant from taking any further action to relocate said billboard signs in violation of the provisions of the Township Code of the Township of Eagleswood.

c Compensatory and punitive damages against the defendant insofar as his actions were a willful disregard of Township ordinances and has resulted in expenditure of municipal funds.

d. That the defendant be permanently restrained from relocating any billboard signs which would be in violation of the Township Code.

e. For costs of suit.

HIERING, GILMORE & MONAHAN
Attorneys for Plaintiff

By
GEORGE R. GILMORE
For the Firm

Dated: May 21, 1981

AFFIDAVIT OF VERIFICATION

STATE OF NEW JERSEY) : SS.:

COUNTY OF OCEAN)

HERMAN O. PHARO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Zoning Officer of the Township of Eagleswood, the plaintiff in the within action.

2. I have read the complaint to which this Affidavit of Verification is attached and I find its contents to be true and factual to the best of my knowledge.

3. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

HERMAN O. PHARO

Sworn to and subscribed before me
this 21st day of May, 1981.

GEORGE R. GILMORE
An attorney at law of the State of N.J.